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CHAPTER 11

GRANDPARENT VISITATION

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I. Introduction

There has been a dramatic change in the rights of grandparents to have an ongoing relationship with their grandchildren. Until recently, the idea that grandparents might go to court to engage in a legal battle over their desire to spend time and maintain a meaningful relationship with their grandchildren was simply unthinkable. The legal principles underlying these changes are more defined due to recent court decisions, but it remains critical for the practitioner who represent clients in these matters to understand and keep up with ongoing developments.

The right of grandparents to have visitation with their grandchildren is purely statutory, and thus, the statute is the starting point for the practitioner, when confronted with such a situation. However, due to the equitable nature of the remedy, one must also look to case law and use common sense when preparing a case for presentation to a court. This chapter will discuss the history and development of the right to grandparent visitation, describe the current New Jersey statute and provide a description of a grandparent visitation case from start-to-finish.

Grandparent visitation is unlike other family law areas in that it introduces third parties into the more traditional nuclear family of parents and their children. For this reason, the practitioner must not only be knowledgeable of the law, but be sensitive to the emotional aspects of the case when counseling his or her clients. Most importantly, at all times, the practitioner must remember that the focus is not only what is in the best interests of the grandchildren, but whether there is proof that the grandchildren will suffer harm if there is no visitation.

II. Historical Perspective

In New Jersey and in all other states, there was no right at common law for grandparents to have visitation with their grandchildren. Even in the case of divorce, grandparents traditionally lacked legal standing to interfere in the nuclear family, and had no viable cause of action cognizable in any court.

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However, major social and legal changes over the past few decades have altered the common law landscape. With advances in medical care, life expectancies have increased and people are staying healthier longer, making it more likely that grandparents will be able to have an active relationship with their grandchildren. Moreover, grandparents have banded together to fight for increased rights for the elderly, and one of the rights for which they have fought hardest is the right to spend time with their grandchildren, even over the objection of the parents.¹

Probably the largest social factor impacting upon grandparent visitation has been the increase in the number of divorces. As divorce has become more prevalent, the result has been a greater number of fragmented nuclear families, non-traditional custodial arrangements, and step-families. A common situation due to the increased number of divorces has been the denial of visitation by the custodial parent to the ex-spouse's parents.

Adding to the confusion and difficulty, divorced parents often remarry, creating a second nuclear family unit with entirely new sets of grandparents and relatives. Moreover, in certain cases, stepparents become adoptive parents, cutting off the legal relationship between the grandchild and one side of his or her biological family.

In addition to the complications wrought by divorce and remarriage, grandparents may face the loss of a relationship with a grandchild due to the death of one of the parents. Finally, many grandparents have no connection to their grandchildren because of an estrangement or ongoing dispute with their own children.

III. Creation of a Statutory Right

All of these factors prompted grandparents into action, and state legislators were not reluctant to grant them remedies for their concerns. In 1972, New Jersey first enacted a statute granting grandparents a right to visitation with their grandchildren. *N.J.S.A. 9:2-7.1*, known as the *Grandparent Visitation Statute* (GVS). The GVS originally provided grandparents a right to have visitation with grandchildren in the event of the death of one of the parents. In 1973, the GVS was

¹ For simplicity, and in an effort to avoid confusion, the members of the first generation will be referred to in this chapter as "grandparents." Their children, the second generation, will be called "parents" or "children," and the third generation will be referred to as "grandchildren."

amended to permit visitation in the event of the divorce of the parents or their separation with or without a court order.²

The GVS gave grandparents the right to bring an action in the Superior Court where the best interest of the grandchildren would be examined to determine whether there should be visitation. N.J.S.A. 9:2-7.1. Although at least one court determined that the grandparents' rights were derivative of the parent's right to visitation, *see Thompson v. Vanaman*, 210 N.J. Super. 225 (Ch. Div. 1986), the Appellate Division ruled that the statute, in fact, created an independent right in the grandparents. *Bennet v. Bennet*, 150 N.J. Super. 509 (App. Div. 1977); *see also Adoption of a Child by M*, 140 N.J. Super. 91 (Ch. Div. 1976).

In 1993, the statute was again amended and significantly expanded the rights of grandparents to visitation. This amendment to the statute removed the death, divorce, or separation requirements and permitted grandparents to bring an action for visitation even when the nuclear family remained intact. Moreover, the eight statutory factors provided guidance to the courts as to what must be considered in assessing a grandparent's right to visitation.

- a. A grandparent or any sibling of a child residing in this State may make an 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 a 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'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;

² A 1988 amendment to the statute extended the same rights to siblings of a minor.

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- (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; and
- (8) Any other factor relevant to the best interests 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 child's best interest if the applicant had, in the past, been a full-time caretaker for the child.

N.J.S.A. 9:7.1.

PRACTICE POINTER: It is important for the practitioner to carefully read and consider the implications of the language of the statute.

In essence, the amendments to the statute created a means for grandparents to petition the court to either maintain or obtain a meaningful relationship with their grandchildren, even over the objection of the parents. The consequences of the amendments have evolved over the years.³

IV. New Jersey Case Law

Since the most recent amendment to *N.J.S.A. 9:2-7.1*, there have been several reported cases concerning grandparent visitation. Although the earlier case law with regard to grandparent visitation was decided and published prior to the broadening of the statute, it remains helpful in understanding the policies and perspectives surrounding the issue.

Perhaps not surprisingly, a constitutional attack was launched against the statute shortly after the amendments were passed by the legislature in 1993. In *R.T. & M.T. v. J.E. & L.E.*, 277 N.J. Super. 595 (Ch. Div. 1994), the defendant parents asserted that the creation of a right to grandparent visitation for intact families impermissibly interfered with the parents' right to raise their children, in violation of the Fourteenth Amendment of the United States Constitution. This challenge was rejected by the court.

Judge Segal observed that the right to parent was not unlimited, and that the State may impose reasonable restrictions upon the parents for legitimate reasons, citing child labor laws, car seat and seat

³ It is interesting to note that the State of Illinois has passed a statute similar to the 1993 version of the grandparent visitation law, and within one year of its passage it was repealed. Illinois felt it had opened the door too far; it is possible that New Jersey may decide likewise in the future.

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belt regulations, and the like. *Id.* at 598. Further, he noted that the statute does not give grandparents an automatic right to visitation; rather, it provides for them the right to apply to the courts for visitation. The court process and judicial discretion, exercised in light of the statutory factors and designed to promote the best interests of the grandchild, prevents the actions of the State from being arbitrary. *Id.* at 599. Finally, Judge Segal reviewed challenges to similar laws in other states. After review, the court determined that, “the statute clearly employs fundamentally fair procedures, it is not arbitrary or capricious and can be said equally to balance the interest of all parties involved.” *Id.* at 601.

No appeal of that decision was published but other cases discussed below have addressed the constitutionality of the statute. Moreover, as *R.T.* is a trial court decision, it is not binding on other trial courts. It should be noted that Judge Segal addressed the status of comparable statutes in other jurisdictions in his opinion, paying careful attention to then recent developments. For example, although Judge Segal pointed to Florida as a state that had upheld a statute similar in provisions to the New Jersey statute, the Florida Supreme Court has since struck down its grandparent visitation statute as unconstitutional on roughly the same grounds as asserted by the defendant-parents in *R.T.*

PRACTICE POINTER: This area of the law remains in flux, and requires up-to-date research by the practitioner.

Another early post-amendment case that may be of use to the practitioner does not strictly address the provisions of the statute, but deals with issues that will be commonly confronted in practice. In *R.K. & L.K. v. A.J.B. & H.B.*, 284 N.J. Super. 687 (Ch. Div. 1995), the plaintiff grandparents were the parents of A.J.B.’s first wife, who had died in 1993. Approximately one year later, A.J.B. was remarried, to H.B. Shortly after the marriage, H.B. filed an action to adopt the child of A.J.B. The grandparents brought an action for visitation rights, sought to intervene in the adoption action, and requested consolidation of the two actions. The basis of their concerns was that the marriage had come too quickly after the death of the first wife, and the grandparents feared that A.J.B. and H.B. would completely cut off the grandchild from relations with her mother’s family.

Judge Fisher determined that the grandparents should be permitted to participate in the adoption action, but that the question of visitation should be heard and decided in a separate action. Although the adoption statute strictly limits the class of persons entitled to intervene, the statute incorporates the Rules of Court by reference. Judge Fisher found the grandparents could be given

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standing to participate in the adoption action under *R. 5:10-5(b)*, which permits the court to “direct that notice of the proceeding shall be given to any persons whose interests may be prejudiced or affected by the entry of a judgment of adoption.” Judge Fisher reasoned that the discretion given by the Rules of Court, and incorporated by the Legislature into the adoption statute, “should be exercised in favor of expanding the class of persons who may be heard when such an expansion could potentially clarify what is in the best interests of the child.” *Id.* at 694. However, the judge denied consolidation of the actions for adoption and for visitation: “It is preferable that there be separate hearings so that the focus on each important issue will not be blurred by the confluence of all the testimony on both subjects at one sitting.” *Id.* at 695-696.

Aside from the practical holding, the subtext of Judge Fisher’s decision offers important cautionary advice that the practitioner may want to pass on to the clients. “Indeed, the grandparents’ opposition to the adoption carries potential disadvantages, in that it may be unlikely to engender the cooperation of A.J.B. and H.B. in keeping the child’s memory of her late mother alive (assuming the grandparents’ worries in that regard are founded), nor would one likely expect, human nature being what it is, any cooperation from A.J.B. and H.B. in the facilitating of the grandparents’ visitation with the child.” *Id.* at 693.

PRACTICE POINTER: The practitioner should advise the clients to consider carefully the long-term impact of litigation on their entire family, including their relationship with the grandchild, before they decide to proceed.

These pre-amendment cases are still useful to the practitioner in planning legal arguments and crafting the almost inevitable legal brief to the court, and are more useful for the analyses and principles that underlie them, rather than for their specific holdings.

The most significant pre-amendment case for the practitioner representing grandparents is *Mimkon v. Ford*, 66 N.J. 426 (1975). In *Mimkon*, the grandchild lived with her mother and grandmother for about two years after the divorce of her parents. In 1970, when the grandchild was four years old, her mother died and her father was granted custody. His new wife, the grandchild’s stepmother, adopted her and, after a few visits, the father and stepmother cut off almost all contact between the grandchild and the grandmother. The grandmother then brought an action for visitation under the statute.

Going beyond the best interests test set forth in the statute, the *Mimkon* Court essentially founded its decision on “natural law” and the biological and emotional bonds between persons related by blood. In fact, the decision finds almost presumptively that grandparent visitation is always in the best interests of a child:

It is a biological fact that grandparents are bound to their grandchildren by the unbreakable links of heredity. It is common human experience that the concern and interest grandparents take in the welfare of their grandchildren far exceeds anything explicable in purely biological terms. A very special relationship often arises and continues between grandparents and grandchildren. The tensions and conflict which commonly mar relations between parents and children are often absent between those very same parents and their grandchildren. Visits with a grandparent are often a precious part of a child's experience and there are benefits which devolve upon the grandchild from the relationship with his grandparents which he cannot derive from any other relationship. Neither the Legislature nor this Court is blind to human truths which grandparents and grandchildren have always known. *Id.* at 437.

The *Mimkon* Court also addressed the five most commonly made arguments against court-ordered grandparent visitation, giving focus to the practitioner in preparing for the adversary's counter-arguments. They are as follows:

- (1) Ordinarily the parent's obligation to allow the grandparent to visit the child is moral, and not legal.
- (2) The judicial enforcement of grandparent visitation rights would divide proper parental authority, thereby hindering it.
- (3) The best interests of the child are not furthered by forcing the child into the midst of a conflict of authority and ill feelings between the parent and grandparent.
- (4) Where there is a conflict as between grandparent and parent, the parent alone should be the judge, without having to account to anyone for the motives in denying the grandparent visitation.
- (5) The ties of nature are the only efficacious means of restoring normal family relations and not the coercive measures that follow judicial intervention.

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66 N.J. at 431 (citations omitted). The practitioner should be aware of these arguments and prepared to meet them, since they will often be raised in opposition to the action for visitation, even in light of the developments of more recent case law.

There are several other cases that should be reviewed by the practitioner in crafting an argument or legal brief in favor of visitation on behalf of his or her clients. In *Globman v. Globman*, 158 N.J. Super. 338 (App. Div. 1978), the court held that where the maternal grandparents had raised one of the two grandchildren for four years during the period of the grandchild's mother's mental illness, they were entitled to visitation when the father denied the grandparents access after divorce. The court indicated that the visitation should be crafted so as to avoid conflict between the father and the grandparents.

In *Thompson v. Vanaman*, 210 N.J. Super. 225 (Ch. Div. 1986), the grandmother had been a full-time caretaker for the three grandchildren, spending about twelve hours per day with them for a period of four years. Family disagreements arose and the parents subsequently cut off the grandmother's contact with her grandchildren. She brought an action for visitation and prevailed. It is interesting to note that the court did not feel limited by the explicit terms of the statute, which at that time did not permit visitation in the absence of death or divorce, but rather found that it had equitable jurisdiction to grant the grandmother's visitation request. The court stated: "The mere fact that a parent does not desire visitation between his children and their grandparents can never by itself be sufficient reason for denying that visitation." *Id.* at 229. The court cited *Globman*, then added: "N.J.S.A. 9:2-7.1 creates a presumption that the best interests of the grandchild are ordinarily served by maintaining contact and communication with their grandparents." *Id.* A fair reading of the statute as it then existed indicates that this observation is not strictly true (nor is it true today), since the statute requires the court to make findings as to the best interests of the grandchild before determining if any visitation should take place.

In *Becker v. Becker*, 262 N.J. Super. 311 (Ch. Div. 1992), a child was born to two unemancipated minors. The mother and child resided primarily in the home of the paternal grandparents, and though the mother returned to her own mother's residence fairly frequently, she came without the baby. The maternal grandmother brought an action for visitation, which was granted based upon the fact that, as an unemancipated minor, the mother technically resided in her mother's home, so she and the father of the child were, in a sense, "separated" within the meaning of the statute.

A case of which the practitioner should be aware, although it has little legal force under the new statute and in light of more recent case law, is *Adoption of a Child by M*, 140 N.J. Super. 91 (Ch. Div. 1976). In dicta, the court observed that it would rarely, if ever, be in the grandchild's best interests to order grandparent visitation over the objection of the parents. However, this is precisely what the 1993 revision to the statute now permits.

Courts have considered grandparents' rights in the context of custody disputes in which grandparents were requesting custody of their grandchildren rather than just visitation and have referenced the GVS. In *S.M. v. A.W.*, 281 N.J. Super. 63, 70-71 (App. Div. 1995), the Appellate Division, citing *Mimkon v. Ford*, *supra*, noted that "it is not accidental that the legislature has seen fit to insure a mechanism to enforce a right on their part to have access to their grandchildren. It represents part of a favored public policy that grandparents are in a special relationship to their grandchildren." So, too, our Supreme Court acknowledged that all 50 states have some form of grandparent visitation statute in addressing the right of third parties to visitation with a grandchild. See *V.C. v. M.J.B.*, 163 N.J. 200, 216 (2000) note 4. Grandparents' impact on the upbringing of their grandchildren and the protection afforded to the grandparents by the statute were even considered in the denial of a custodial parent's request to relocate from New Jersey to Montana. *McMahon v. McMahon*, 256 N.J. Super. 524, 535 (Ch. Div. 1991). The importance of grandparents to their grandchildren has clearly been recognized by our courts.

However, those grandparents' rights are viewed on a case-by-case basis, considering the facts and circumstances of each family. The Court further delineated the rights of biological grandparents following the termination of the parental rights of a natural parent and subsequent adoption by non-family parties in *In the Matter of the Adoption of a Child by W.P. and M.P.*, 163 N.J. 158 (2000). K.S. and M.J.S. were the natural grandparents of V, who at six months old was placed in the custody of non-relatives by her unmarried mother. The biological father was incarcerated and the mother consented to the adoption by the non-relatives, thereby terminating her parental rights. After some time, the father's parental rights were also terminated but his parents maintained an application for visitation with V. The adoptive parents filed an appeal after the trial court granted continuing visitation to the grandparents. The appellate court decided the case on statutory grounds and did not address the constitutional argument. The Court found that the GVS was inherently in conflict with the *Adoption Act* as applied and public policy and the law precluded grandparent visitation when intact,

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non-relative parents adopt a child. *Mimkon v. Ford*, *supra*, was specifically distinguished and the Court declined to extend the pre-statute *Mimkon* holding to non-relative adoptions. Thus, when the rights of natural parents are terminated, the rights of the natural grandparents are also extinguished. (This case is particularly instructive in its presentation of the legislative history of the GVS. *Id.* at 165-169.)

In 2000, the United States Supreme Court decided *Troxel v. Granville*, 530 U.S. 57 (2000), invalidating Washington State's grandparent visitation law because it violated a parent's constitutional right to raise their child. *Troxel* opened the way for further challenge of the New Jersey statute. In order to resolve the particularly difficult controversy, the Appellate Division took original jurisdiction in *Wilde v. Wilde*, 341 N.J. Super. 381 (App. Div. 2001), in which the grandparents sought visitation with the children of their son, who had committed suicide. The Court declined "the opportunity to resolve the facial validity of the GVS." However, it took note of the fact that the United States Supreme Court in *Troxel* acknowledged that litigation brought by grandparents against a fit, natural parent was in and of itself a burden on the parent's substantive due process rights. *Id.* at 395. The Court relied on the legislative history of the GVS in concluding that the statute was unconstitutional as applied and reiterated Justice Garibaldi's inference in *In re Adoption of a Child by W.P. and M.P.*, *supra* at 543, wherein she stated that the parental autonomy should be given deference. The *Wilde* Court found it would have been an invasion of the mother's privacy to compel her to participate in therapeutic mediation with the grandparents, who had initiated the litigation without attempting to resolve the issues and had demeaned the mother throughout the process. *Id.* at 399.

The New Jersey Supreme Court again had the opportunity to consider the constitutionality of the GVS in *Moriarity v. Bradt*, 177 N.J. 84 (2003), in light of *Troxel* and prior New Jersey case law. In testing the statute against the fundamental right of fit parents to make decisions regarding the care and custody of their children, the Court held that "grandparents seeking visitation under the statute must prove by a preponderance of the evidence that denial of the visitation they seek would result in harm to the child. That burden is constitutionally required to safeguard the due process rights of fit parents." *Id.* at 88.

Justice Long provided a procedure for trial courts to apply in grandparent visitation disputes. First, the grandparents must present evidence, either factual or by way of expert testimony, that the grandchildren would be harmed if visitation was denied. The death of a parent or the breakup of the

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family home by divorce or separation can be considered. Once the potential for harm is proven by a preponderance of the evidence, the grandparents have succeeded in overcoming the presumption in favor of parental decision-making. The parents must then offer a visitation schedule. If that schedule is accepted, the matter is settled. Otherwise, the court must assess the schedule based on the statutory factors and the grandchild's best interests. If visitation is not totally denied to grandparents but is deemed insufficient by them, they will have the right to make the same application and go through the same process. If potential harm is proven, the visitation schedule will be evaluated in light of the grandchild's best interests. The result of the Court's decision in *Moriarty* was to sustain the statute "by adding a threshold harm standard that is a constitutional necessity because a parent's right to family privacy and autonomy are at issue." *Id.* at 117-119.

Interestingly, the Court found that the grandparents did, in fact, meet their burden. The parents' Petition for Writ of Certiorari to the Supreme Court of New Jersey was denied. Since the New Jersey Supreme Court's holding in 2003, Justice Long's procedure has been applied numerous times, and in most instances grandparents have been denied visitation on the grounds that they had failed to demonstrate that the grandchild would suffer harm absent the visitation.

For example, *Mizrahi v. Cannon*, 375 N.J. Super. 221 (App. Div. 2005), involved a visitation dispute between the child's paternal grandparents and adoptive parents, who in this case were the great aunt of the child and her husband. The biological parents of the child were unmarried and the mother had died of cervical cancer. The father was barred from having any contact with the mother or the child pursuant to two separate restraining orders. Despite the lack of relationship between the child and her father, the paternal grandparents financially assisted the mother and child by paying rent, utilities and other necessities. Due to the mother's impending death, the child moved in with her great aunt and her husband, who obtained an order granting them custody. The paternal grandparents sought grandparent visitation after the child's maternal great aunt and her husband sought to adopt the child.

The Appellate Division reversed the Family Part's decision granting visitation to the grandparents. The Court held that the trial court had erred, because while it "recognized the language in *Moriarty*, requiring grandparents to demonstrate by a preponderance of the evidence that visitation with a grandchild was necessary to avoid harm to the child, it analyzed the record in terms of the (child's) best interests, rather than whether (the child) would experience harm if she did not visit with

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the (paternal grandparents).” *Id.* at 232. The Appellate Division, in its review of the trial, did not find that any evidence was presented that the child would suffer any type of harm if denied visitation with the paternal grandparents. Therefore, the Court held that the paternal grandparents had failed to satisfy their burden of proving by a preponderance of the evidence that there would be harm to the child if visitation was denied.

Be aware of the 2005 unpublished opinion of *Delpizzo v. Constanzo*, 2005 WL 2738532 (App. Div. Oct. 25, 2005), a rare case in which the Court ruled in the grandparent’s favor. The visitation dispute was between the paternal grandparents and the children’s mother. The children’s father was deceased. The Court found that a “substantial relationship” existed between the children and the paternal grandparents before and after the marital separation.

The Court distinguished the facts of this case from *Mizrahi* and found that a denial of grandparent visitation would result in harm to the children. In affirming the decision, the Appellate Division recognized that there had been a specific finding of “a long-term relationship, where there has been a lot of love, a lot of contact and both frequent and high quality activity between grandparents and grandchild, there is harm if that relationship is totally severed.” *Id.* at 6. The Court determined that the relationship between the children and the grandparents was consistent with the relationship in *Moriarty*. For these reasons, the Appellate Division affirmed the Family Part’s order directing the parties to engage in counseling to facilitate future unsupervised visitation between the children and the paternal grandparents.

Accordingly, it is essential for the practitioner to understand that absent proof of concrete harm to the children, pursuant to *Moriarty*, the Court will not grant visitation. In addition, recent case law has proven that the high burden of proof of harm can be very difficult to meet. The holdings of *Daniels v. Daniels*, 381 N.J. Super. 286 (App. Div. 2005), *Wellington v. Wellington*, 2006 WL 3154136 (N.J. Super. App. Div. Nov. 6, 2006), *Rente v. Rente*, 390 N.J. Super. 487 (App. Div. 2007), all denied grandparents’ requests for visitation based upon an absence of a showing of harm to the grandchildren.

In the case of *Daniels v. Daniels*, 381 N.J. Super. 286 (App. Div. 2005), a paternal grandmother filed a complaint seeking visitation with her grandchildren. The trial court granted defendant’s motion to dismiss plaintiff’s complaint. On appeal, the Appellate Division found, “[i]n this case, of course, the plaintiff’s complaint did not even meet the very low standard of notice

pleading as it made no mention of harm to the children, an essential element of a claim under the GVS Because we find that the plaintiff neither pled nor presented evidence that the cessation of visitation would cause particular harm to the children, the complaint was property dismissed.” *Id.* at 297.

PRACTICE POINTER: When filing a Complaint on behalf of a grandparent in a visitation case, make sure to plead with particularity the harm element in your initial complaint.

In the case of *Wellington v. Wellington*, 2006 WL 3154136 (N.J. Super. App. Div. Nov. 6, 2006), the parents of the children appealed from an Order from the Family Part granting the maternal grandmother visitation with their children over their objections. The facts of this case are interesting in that the parents and oldest child resided with the maternal grandmother for a period of time. In reviewing the record, the Appellate Division stated: “the trial judge found that plaintiff enjoyed a long-standing loving relationship with (the oldest child) during the first six years of his life that they lived in the same household, albeit interrupted by a six to nine month gap. The judge further found that without specifying frequency, which was disputed, that plaintiff had “regular, routine contact with (the children) even after she moved out of the residence for a period of one (1) year.” *Id.* at 4. The maternal grandmother’s complaint sought visitation with all three of her grandchildren.

Both parties provided expert testimony to the Court. In reviewing the record, the Appellate Division found that while there was evidence of a long term relationship with the oldest child, there was no evidence of concrete harm to the child by the termination of contact between him and his grandmother. The Court held that the fact that the grandchild “missed his grandmother and would like to see her again is not enough. He suffered no trauma from the termination of the relationship and remained a happy and well-adjusted child in the ensuing year and a half without contact.” *Id.* at 9.

In *Rente v. Rente*, 390 N.J. Super. 487 (App. Div. 2007), the mother of the child appealed from a Family Part order granting the paternal grandparents visitation with the minor child. The Family Part Judge relied on the opinion of the Court-appointed expert’s psychological evaluation and read a portion of his report into the record which stated: “It is my impression that both natural parents have significant adjustment problems that impair their parenting ability, which in my opinion underscores the need for grandparent contact, because (the grandparents) represent the only stable influence in (the child’s) life at this time.” *Id.* at 492.

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The Appellate Division reversed and found that despite the expert's report and the evidence that the grandparents had cared for the child, the trial court made no finding that visitation was necessary and that the offered monthly supervised visitation was insufficient to avoid harm to the child. The Appellate Division found a number of procedural deficiencies in the trial Court's ruling. Notwithstanding, the Appellate Division stated that regardless of the procedural issues related to the expert's report, the report was "insufficient to establish the requisite harm under *Moriarty*." *Id.* at 495. Therefore, since the grandparents failed to meet their burden of proof of harm, the grandparent visitation order was reversed.

The practitioner should review the unpublished opinion *Reinhardt v. Sperber*, 2007 WL 3196143 (N.J. Super. App. Div. Nov. 1, 2007), which is the most recent case in which the Appellate Division ruled in favor of the grandparents seeking visitation. In *Reinhardt*, the maternal grandparents filed a Complaint for grandparent visitation as a result of their son-in-law's attempt to circumvent their relationship with their granddaughter after the death of their daughter.

The facts of this case are unique. The grandparents relocated from Philadelphia, Pennsylvania to New Jersey, just one block from where their daughter and son-in-law lived with their granddaughter to care for their daughter and assist with the care of their granddaughter during their daughter's illness. Even after their daughter had died, the grandparents continued to assist their son-in-law in caring for their granddaughter. The Appellate Division found that the grandparents had presented a sufficient prima facie case of harm to the child under the Grandparent Visitation Statute and ordered that the matter be scheduled for a plenary hearing. In its decision the Court stated, "We cannot imagine how disrupting the ongoing relationship and potentially severing the bond with [the child's] maternal grandparents, who have clearly been an integral part of her life, would not cause a further pervasive sense of loss and significant harm to this young child." *Id.* at 5.

It is apparent that there have been numerous changes in the implementation of the Grandparent Visitation Statute over the years. The recent case law demonstrates that satisfying the high burden of proof of harm, required under *Moriarty*, has made the relief of grandparent visitation nearly unattainable. Will our nation's highest court see fit to scrutinize another state grandparent visitation statute? The future of the implementation of the grandparent visitation statute remains to be seen.

V. Bringing the Action for Grandparent Visitation

A. The Initial Client Interview

The initial interview with potential clients can be an extremely difficult experience for them. Unless your clients have been through a divorce, the experience of exposing such personal family details to a total stranger will be very uncomfortable. It is important to make the clients feel at ease with you, and your interviewing technique should be tailored to this end. Be as empathetic as possible, tempering your normal business manner with compassion.

The initial information that must be obtained is the names and addresses of all potential parties involved (e.g. the parents, the grandchildren, step-parents). Home and work addresses, including county, will be critical in determining jurisdiction and venue, and will enable you to effectuate service of process. Ages and dates of birth of the grandchildren will also be important in presenting your case to the court.

From the start, it is important to obtain a picture of the entire family of your clients, even though all of their children may not be involved in the case at hand.

PRACTICE POINTER: You may wish to draw a family tree with your clients' help, so that you will understand all of the biological and emotional ties to your clients and to the grandchild in question.

In certain cases, some of those people may become witnesses for — or against — your clients, and you must be prepared in either case.

Emotionally distraught clients tend to speak in a stream-of-consciousness, starting with the immediate problem first and wandering back and forth through time, picking out the most egregious or memorable events without concern for their time reference. You must guide the clients' recollection in such a manner that the story will be comprehensible to you.

PRACTICE POINTER: Usually starting from the grandchild's birth will focus their attention. However, your questioning in the first interview must recognize that relationships are not built or destroyed overnight, and some description of earlier events will be necessary.

The most important goal of the initial interview is to obtain a detailed description of the relationships between the grandparents and the parents, and between the grandparents and the grandchildren. You must learn how frequent their contact with the grandchildren had been, and the

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nature of that contact, prior to the cessation or reduction of such contact. If there had been daily care, establish when and for how long. Find out, on average, how many times per year they had contact with the grandchildren (oral, written and personal), and whether that contact was limited to holidays and special occasions. Determine whether there were any extended vacations taken with the grandchildren, and whether those vacations included the parents.

Difficult personal questions must be asked, so as to prevent surprise at a later point. You must ascertain whether there has been any history of substance abuse or addiction by either of the grandparents. In light of recent case law, it should even be determined whether one or both of them smoke cigarettes. Carefully explore the topics of physical and sexual abuse, both of which are obvious land mines that could destroy your case.

If these clients have other children or grandchildren, get a general sense of the nature of those relationships as well. Explore why those relationships are different. Determine whether the other children have become involved in the immediate dispute, and if so, what their role has been. Be attentive to what is said about these other relationships.

Most importantly, remember that your clients have come to you because communication has clearly broken down within the family, which is especially true if the marriage of the parents of the grandchildren is still intact. Clearly, in this situation, the problem is more than likely much deeper than the lack of contact between grandparents and grandchildren. Be sure that you obtain this “deeper” information from your clients.

Once you have taken all of the necessary background and factual information from your clients, determine what your clients’ expectations are, and exactly what it is that your clients are trying to achieve. Often, they are not exactly sure where else to go, and they will expect you to have answers. Immediate litigation is not always the best course of action, and often will be counter-productive, as observed by Judge Fisher in *R.K.*, *supra*. The practitioner must gauge the clients’ flexibility to determine whether a settlement without litigation may be possible, and whether mediation and/or family counseling may be the preferred means of resolution.

In the initial interview, you should also communicate to the grandparents the reality of what can be expected. Any litigation involving children is emotionally charged, and is usually quite expensive, as this litigation will more than likely require expert report/testimony in order to achieve

the intended result. The grandparents will most likely have to participate in a psychological evaluation, exposing their family life to the scrutiny of the expert (more than likely someone chosen by the court), the court itself, and potentially the public, since New Jersey family matters are not automatically sealed. Additionally, they should understand that the older the grandchild, the more difficult it may be to get the grandchild's cooperation and enthusiasm in the face of opposition and disapproval by the grandchild's parents. The grandparent should also be prepared to fight a protracted legal battle, in which they may prevail, only to find that the situation has become so untenable that the litigation was not worth it.

PRACTICE POINTER: Another helpful practice is to provide the grandparent with a copy of the statute, as this is the guideline for obtaining the relief sought, and clearly sets forth the factors which will be considered. This aids the practitioner in getting the grandparent to begin focusing on the factors which the court considers relevant. The practitioner may also request that the grandparent prepare a written response for each of the factors enumerated in the statute.

Litigants and practitioners should take heed of Judge Coburn's language in *Wilde v. Wilde*, 341 N.J. Super. 381, 397 (App. Div. 2001):

Before engaging the courts, grandparents should be obliged to make substantial efforts at repairing the breach and, in addition, litigation ordinarily should not be threatened before visitation has been denied with finality. If litigation becomes necessary because the parent or parents have persistently resisted the grandparents' respectful and patient overtures, it must be conducted with restraint. In other words, the grandparents must refrain from denouncing, demeaning and impugning the parent's character.

B. Preparing the Complaint

Once you have all the information in hand, and assuming your clients want to proceed immediately with litigation, you must prepare your initial pleading. If there is a divorce case in progress, it would be appropriate, if not necessary under the "Entire Controversy Doctrine" (R. 4:30-A), for you to prepare a motion to intervene in order to be heard on the issue of visitation.

If there is no existing court action, a complaint for visitation should be filed in the appropriate court. If the child is a New Jersey resident, the venue of the action should be dictated by the county in which the child resides. If the child resides outside the State of New Jersey, the *Uniform Child Custody Jurisdiction Act* (UCCJA), enacted in New Jersey as *N.J.S.A. 2A:34-28 et seq.*, controls. To reduce it to its most simple terms, the UCCJA gives a state jurisdiction over a child if it is the state in

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which the child was born or has been a resident for six months.⁴ Having to file in another state will add to the expense and complexity of the litigation, as it may be necessary to retain local counsel and litigate in the other state. Also, since grandparent visitation is a state-law issue, your knowledge of New Jersey law will not assist your clients in that other state.

The Complaint for Visitation, like any other pleading, must state such facts as will support the cause of action. State clearly the names and ages of the parties involved and note their relationship to each other (mother of, daughter of, etc.), so that the court will understand the cast of characters.

The heart of the Complaint will be the factual description of your clients' relationship with the grandchild, and this should be the focus of your drafting. The critical legal facts that are recited in the Complaint should always reflect the factors set forth in the statute, such that the pleading will establish a grounds for meeting the burden of showing that, by a preponderance of the evidence, the visitation will be in the best interests of the grandchildren. In drafting the complaint, you should be guided by the statutory factors and be sure to allege the facts that support a finding in favor of your clients on as many factors as possible. Be sure to plead, with particularity, the harm to the children if the visitation is denied.

In a clear, precise manner, you should distill into short paragraphs the facts that your clients gave you about their family relationships. Pay particular attention to the relationship between the grandparents and the grandchild, as this will be the most important aspect of your case. Describe the types and frequency of contact, the warmth and closeness of their relationship, the sense of loss the grandparents have suffered since the date of their last contact with the grandchildren.

Depending on your particular case, you will want to tailor your description of the relationship between the grandparents and the parents. If you believe that the matter can settle without a hearing, you should avoid words of blame and the implication that it is all the younger generation's fault. If the parents are divorced or separated and there is a time sharing plan in place, describe that schedule and demonstrate that the grandparents' visitation can fit into that schedule without interfering with it. Also, explain why visitation with the grandchild during the parent's timesharing may not be sufficient. Demonstrate that the relationship between the grandchild and his or her parents will not be negatively impacted by the visitation between the grandparents and the grandchild. Finally, state that there is no

⁴. The statute itself must be reviewed by the practitioner for a complete understanding of the UCCJA.

history of emotional, physical or sexual abuse, or neglect, by the grandparents, and that neither of the grandparents has a substance abuse problem.

The prayer for relief should minimally request a plenary hearing as to the visitation issue and the best interests of the grandchild, and establishing a visitation schedule.

C. Motion Practice

Once the complaint has been filed, it will be assigned a non-dissolution docket number (FD number) unless it is part of the matrimonial or custody action between the child's parents. The next step is the filing of a motion for temporary visitation pending the final hearing and requesting the court to appoint a mental health professional to perform an evaluation of the family. This application will be heard by the judge assigned to the case in chief.

The primary goal of this motion, of course, will be to obtain for your clients some visitation with their grandchild while the matter is pending, rather than awaiting the hearing. However, it will also bring the court's attention to your case sooner, rather than letting it languish on the docket for months. The court may also be able to provide input in the form of an in-chambers conference with the attorneys that can assist in the amicable settlement of the matter.

The court may also take the opportunity on the motion to appoint a guardian *ad litem* to represent the grandchild and independently determine what would be in the grandchild's best interest. See *In re Maraziti*, 233 N.J. Super. 488 (App. Div. 1989). In light of the fact that the parents and grandparents of the grandchild will each have their own agenda, it is wisest to have a guardian *ad litem* appointed in order to present to the court an unbiased view, from the grandchild's perspective. See Rule 5:8B.

VI. Final Resolution: Trial or Settlement

Like divorce actions, grandparent visitation actions should never be tried unless absolutely necessary. The emotional toll on the parties is generally too high to justify a trial, and the financial cost, in terms of expert fees and attorneys' fees may be crippling for a family of modest means. Further, if grandparent visitation is forced upon parents (or grandchildren, for that matter), against their wishes, it may only serve to further damage the relationship. As with many divorce cases, the action for grandparent visitation places the grandchildren in the middle of a heated battle fought between people who love them, and who are silently pressuring them to take sides.

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Courts prefer not to try these kinds of cases and will generally make every effort to assist the attorneys in settling the matter. The mental health professional selected to perform the evaluation may be of great help in trying to settle the disputed issues among the parties. Alternatively, a mediator, either court appointed or mutually agreed to by the parties, can also be an extremely beneficial option for the parties. In a grandparent visitation action, the attorney's usual role as advocate should be tempered by his or her responsibility as a human being to assist in the healing of the family unit

However, if the disputed issues must ultimately be resolved by the court, the practitioner must carefully prepare for the plenary hearing. Obviously, the most important witnesses will be the grandparents and they should be carefully prepared to present their position in a sympathetic light. The mental health professional will also be an important witness. Judges, like attorneys, are not usually trained in psychology, and the court wants to be told how the visitation – or lack thereof – is likely to affect the child. Remember, it is the grandparent's burden to prove, by a preponderance of the evidence, that the children will be *harmed* if visitation is denied. Other family members may bolster the grandparents' testimony, but care must be taken to prepare for the inevitable cross-examination regarding bias.

If it appears to be in your clients' favor, you may wish to request that the court interview the grandchild in chambers without any of the attorneys or clients present. You must remember that although your client believes that the grandchildren will provide the court with information that is favorable to their position, this may not be the case. Additionally it should be noted that, some judges find interviewing children in chambers to be one of the most difficult and burdensome responsibilities they have. You should advise your clients that if the judge gets the sense that your clients have coached the child, their credibility with the court will be destroyed. Therefore, it is critical that your clients not coach or influence the children in any way. In order to prevent the other side from coaching, you may wish to propose that the interview take place on very short notice, perhaps even the same day, without giving the grandchildren details about where they are going and why.

Actions involving children may not end until the children reach the age of adulthood. When the case is completed, whether by settlement or final judgment of a court, it is important to discuss with the grandparents the probability that the situation will change as the grandchildren mature and grow. What was acceptable when the grandchild was five years old may be unreasonable for a teenager with an active schedule full of after-school activities and/or sports. All parties should be

advised that they must attempt to be flexible as the children get older. They might wish to agree that, once the grandchildren reach a certain age (*e.g.* twelve or thirteen), they can communicate directly with their grandparents with regard to a visitation schedule.

VII. Conclusion

Like all family matters, grandparent visitation cases pull at the emotions in many ways. It is difficult to see families that are in conflict and unable to agree on the essential contact between the younger and older generations. The high intensity of emotions in these cases make it very difficult for attorneys to assist their clients in reaching a settlement. For the same reasons, grandparent visitation cases can also be difficult to litigate. However, it is important to remember that these cases can also be extremely rewarding, since the attorney is in a unique position of being able to assist in the reunification of a family, or at least can help build a connection between grandparents and grandchildren, which is surely some of the most important work an attorney can do.

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