

RECORD IMPOUNDED

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**SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-3232-21**

K.S.J.,

Plaintiff-Respondent,

v.

J.K.,

Defendant-Appellant,

and

K.A.K.,

Defendant-Respondent.

Submitted December 21, 2022 – Decided January 23, 2023

Before Judges Firko and Natali.

On appeal from the Superior Court of New Jersey,
Chancery Division, Ocean County, Docket No. FD-15-
0287-22.

Jessica R. Carosiello, attorney for appellant.

Respondent K.S.J. has not filed a brief.

Respondent K.A.K. has not filed a brief.

PER CURIAM

Defendant J.K. (Joan)¹ appeals from a May 16, 2022 Family Part order awarding visitation of her daughters, A.K. (Ann) and S.K. (Sally), then nine and eight years old respectively, to plaintiff, K.S.J. (Kara), under the Grandparent and Sibling Visitation Statute, N.J.S.A. 9:2-7.1 (Act). For the following reasons, we reverse the court's visitation order and remand for further proceedings.

I.

Joan and defendant K.A.K. (Kyle) were previously married and have three children: Q.K. (Adam), Ann, and Sally. Kara is Kyle's mother and the children's paternal grandmother. When Joan and Kyle divorced on July 27, 2020, they did not enter into a settlement agreement nor did the court enter an order establishing custody or setting a parenting time schedule relative to their three children. Adam has been living with Kara since at least November 2020 due to his behavioral difficulties and conflicts with Joan's new husband. According to Joan, had Kara not permitted Adam to live with her, Joan would have placed

¹ We use initials and pseudonyms to protect the identity of J.K., a victim of domestic violence, and to preserve the confidentiality of these proceedings. R. 1:38-3(d)(10).

him in an institution, which she had previously done in 2019.² In 2022, following Joan's filing of this appeal, the court granted Joan sole legal and physical custody of Ann and Sally.

On December 13, 2021, Kara filed a verified complaint seeking visitation with Ann and Sally. She also sought custody of Adam, along with reimbursement for the costs she expended for Adam's bedroom furniture set. Joan did not object to Kara's custody request of Adam but opposed her application for grandparent visitation. Kyle did not file any responsive pleadings.

On April 6, 2022, after a hearing that same day, the court entered an order granting joint legal custody of Adam to Joan, Kyle, and Kara, denying Kara's request for reimbursement for the bedroom set, and permitting Kara additional time to file a reply to Joan's opposition to her request for visitation of Ann and Sally. In her responsive certification, Kara stated she knew "without doubt" Ann and Sally miss her and want to see her.

The court held a hearing on May 11, 2022, in which Kara, Joan, and Kyle testified. The court proceeded with the hearing without first addressing if

² We also note Adam is no longer subject to the Family Part's jurisdiction, as he turned eighteen years old in 2022.

discovery was appropriate or necessary, and neither the parties nor the court raised the possibility of placing the matter on a complex track pursuant to Rule 5:5-7(c).

In her testimony, Kara stated she last saw the girls in October 2021 for five minutes, when Joan allowed them to attend Adam's birthday party at Kara's house. According to Kara, besides this occasion, the girls have not been permitted to visit their brother and have not been in contact with him. Kara testified the last time she saw the girls prior to Adam's birthday was approximately July 2021.

Kara also claimed, however, before she was suddenly cut off from communicating with Ann and Sally, she had been "physically, financially, and mentally involved with" all three children "since [their] birth[s]," saw them every weekend, bought them clothing and food, and took them to activities, the movies, and church. She claimed the children were "constantly" at her home and spent time with her on a "regular basis." Additionally, Kara stated Joan and the grandchildren lived with her for three weeks in the winter of 2018, after having been evicted from their residence.

On cross-examination, Joan's counsel asked Kara about the harm the children would suffer if grandparent visitation was denied, to which she responded:

Oh, well, in their best interests, I'm [their grandmother]. And, again, loving on them, missing the time that they spend with me, as well. Our movie time, our story time, our sleep overs. Cooking together. Pretty much doing our girly thing, because that's exactly what we've done, you know, since they've been born. Shopping. You know, just a lot of things.

She further stated her application concerned Ann's and Sally's "well[-]being. You know, to continue to know their grandparents, their family. And, also . . . the well[-]being of how [they would] feel not being with me."

Kara also claimed to have regularly sent the girls essential items, such as boots, pajamas, undergarments, and other winter clothing items, and lamented Joan's lack of response when she reached out about gifts she sent the girls for their birthdays and Christmas. Finally, Kara testified Adam calls his sisters from time to time but does not have a personal relationship with them because "[Joan] won't allow it," which is "traumatizing" to him since they are siblings.

Joan disputed much of Kara's testimony. Joan testified Kara did not attempt to speak with Ann and Sally on the phone and never sent them Christmas

or birthday presents. Joan also denied Kara was as active in the children's lives and testified Kara had not seen the girls since the summer of 2020.

Joan also stated Kara evicted her and the children from her home in September 2018, at which point they stayed primarily in a shelter for victims of domestic violence, and Kara failed to make any effort to care for the children during that time. Joan also explained, prior to their living in the shelter, Kara would only see the children approximately twice per month when they went to their great-grandmother's house because Joan did not allow them to visit Kara's home. According to Joan, after they moved out of the shelter, Kara had little to no contact with the girls and it had been four years since the girls stayed at Kara's home.

Joan admitted Kara sent text messages a few times asking to see the girls, but claimed Kara refused to visit Joan's home to visit Ann and Sally, and was only willing to see them at her house. Further, Joan contended her daughters maintained a relationship with their brother, and they had in fact spoken the day before the hearing. Joan denied she ever prevented a relationship between the siblings.

Kyle testified and agreed with Kara's description of her relationship with Ann and Sally. On cross-examination, however, he admitted he had not spoken or seen his daughters in approximately one year.

At the conclusion of the parties' testimony, the court granted Kara grandparent visitation rights and explained its ruling in an oral decision. Specifically, the court granted Kara one phone call per week and one three-hour visitation per month. The court supported its decision after first addressing the best interest factors under the Act.

With respect to Kara's relationship with Ann and Sally, see N.J.S.A. 9:2-7.1(b)(1), the court noted "[w]hile it would agree . . . [Kara] does not have a relationship with the children[,] [it] [doesn't] necessarily know who's the cause of that." The court further explained it does not know "if it's [Kara] necessarily not reaching out in a way that's preferred by [Joan] . . . if it's [on] [Joan's] term[s] and at her house . . . [or] if [Kara] tried hard enough." The court then credited the "concern and desire by [Kara] and the rest of the family . . . to make sure . . . this relationship somehow is mended while the children are still young"

As to the relationship between Joan and Kara, see N.J.S.A. 9:2-7.1(b)(2), the court acknowledged Kara taking on responsibilities to care for Adam, and noted "[Kara] did a service to [Adam] and the rest of the family by taking in this

child to provide a living space and a home." With respect to the time lapse since Ann and Sally had contact with Kara, see N.J.S.A. 9:2-7.1(b)(3), the court again acknowledged Kara and Joan's contradicting testimonies as to when Kara's communication with the girls ceased. The court concluded, however, at the very least, there was some form of regular contact between Kara and the children before that time.

Regarding the effect visitation would have on Joan's relationship with the girls, see N.J.S.A. 9:2-7.1(b)(4), the court was satisfied Kara would not disparage or disrespect Joan during her visitation with Ann and Sally, as evidenced by her care of Adam. The court also noted Joan and Kyle did not have a visitation arrangement, and separate litigation was pending to address that issue. See N.J.S.A. 9:2-7.1(b)(5). Additionally, the court found Kara made her application in good faith, see N.J.S.A. 9:2-7.1(b)(6), and there was no accusation Kara had ever abused or neglected Ann and Sally, see N.J.S.A. 9:2-7.1(b)(7).

Considering the factors in totality, the court determined visitation was in the children's best interests because "there is harm to the girls without having communication[,] or an open communication to be able to be able to call grandma, be able to see their brother, be able to have that open relationship

without having obstacles to . . . jump through." When Joan's counsel asked the court to identify the clear, specific, and concrete harm that would visit upon the children if visitation was denied, the court stated:

[H]ere is the [c]ourt's identifiable harm . . . the girls are not going to have communication with a certain part of their family, have an open relationship with [their] brother that lives at [Kara's], be able to facilitate a family bond that they have had since the beginning of their life up until recently to a person who has acted as [their] grandmother, who is loving to them and is able to provide for them, to assist with their care and provide.

The court memorialized its decision in a March 16, 2022 order. This appeal followed.

II.

Our limited scope of review of a trial court's findings is well established. See Cesare v. Cesare, 154 N.J. 394, 411 (1998). We accord deference to the family courts due to their "special jurisdiction and expertise" in the area of family law, and we will not disturb the court's factual findings and legal conclusions "unless [we are] convinced . . . they are so manifestly unsupported by or inconsistent with the competent, relevant and reasonably credible evidence as to offend the interests of justice." Id. at 412-13 (quoting Rova Farms Resort, Inc. v. Invs. Ins. Co., 65 N.J. 474, 484 (1974)).

Joan argues the court abused its discretion in granting Kara visitation because the court: (1) undertook the best interests analysis without first requiring Kara to establish the children would suffer specific and concrete harm if visitation was denied; and (2) granted Kara visitation on a summary basis without providing an opportunity for discovery.

We begin by reviewing the applicable legal principles as set forth in Moriarty v. Bradt, 177 N.J. 84, 117 (2003), and reaffirmed by the Supreme Court in Major v. Maguire, 224 N.J. 1, 7 (2016). Pursuant to the Act, a grandparent seeking visitation over the objection of a fit parent "must prove by a preponderance of the evidence that denial of [the visitation] would result in harm to the child." Major, 224 N.J. at 7. "Substantively, it is a 'heavy burden.'" Slawinski v. Nicholas, 448 N.J. Super. 25, 34 (App. Div. 2016) (quoting Major, 224 N.J. at 18). Only "[i]f . . . the potential for harm has been shown [can] the presumption in favor of parental decision making . . . be . . . overcome." Id. at 33 (quoting Moriarty, 177 N.J. at 117). Thus, the grandparent must make "a clear and specific allegation of concrete harm to the children." Daniels v. Daniels, 381 N.J. Super. 286, 294 (App. Div. 2005).

The alleged harm must be "significant" enough to "justify[] State intervention in the parent-child relationship." Id. at 293. "Mere general and

conclusory allegations of harm . . . are insufficient." Id. at 294. The purpose behind this heightened pleading requirement is "to avoid imposing an unnecessary and unconstitutional burden on fit parents who are exercising their judgment concerning the raising of their children" Ibid. Otherwise, "any grandparent could impose the economic and emotional burden of litigation on fit parents, and on the children themselves, merely by alleging an ordinary grandparent-child relationship and its unwanted termination." Id. at 293.

The Moriarty Court provided the following examples of the types of supporting evidence grandparents can produce to establish harm to a child:

The grandparents' evidence can be expert or factual. For example, they may rely on the death of a parent or the breakup of the child's home through divorce or separation In addition, the termination of a longstanding relationship between the grandparents and the child, with expert testimony assessing the effect of those circumstances, could form the basis for a finding of harm.

[177 N.J. at 117.]

Additionally, in Slawinski, we described the level of harm a grandparent must demonstrate before a court is required to determine whether visitation is in a child's best interest. We stated:

[P]roof of harm involves a greater showing than simply the best interests of the child. [Moriarty, 177 N.J.] at 116 (stating that a dispute between a "fit custodial

parent and the child's grandparent is not a contest between equals[,] consequently "the best interest standard, which is the tiebreaker between fit parents, is inapplicable") The harm to the grandchild must be "a particular identifiable harm, specific to the child." Mizrahi v. Cannon, 375 N.J. Super. 221, 234 (App. Div. 2005). It "generally rests on the existence of an unusually close relationship between the grandparent and the child, or on traumatic circumstances such as a parent's death." [Daniels, 381 N.J. Super. at 294]. By contrast, missed opportunities for creating "happy memories" do not suffice. Mizrahi, 375 N.J. Super. at 234.

[Slawinski, 448 N.J. Super. at 34 (third alteration in original).]

"Only after the grandparent vaults the proof-of-harm threshold will the court apply a best[] interests analysis to resolve disputes over visitation details." Ibid. N.J.S.A. 9:2-7.1(b) lists the following factors to be considered in the best interests analysis:

- (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; and
- (8) Any other factor relevant to the best interests of the child.

The need for a fact-sensitive approach has been emphasized as part of the development of reforms to the procedures applicable to grandparent visitation cases. In R.K. v. D.L., 434 N.J. Super. 113, 133 (App. Div. 2014), we held "a complaint seeking grandparent visitation as the principal form of relief should not be automatically treated by the Family Part as a summary action requiring expedited resolution, merely because it bears an FD docket." In doing so, we recognized such actions were ill-suited for use in grandparent visitation cases because they "inadvertently inhibited [the grandparents'] ability to present their case in a manner likely to produce a sustainable adjudicative outcome." Id. at 129.

Following our decision, the Supreme Court adopted rule amendments, effective September 1, 2015, that: permitted a party to request the case be

designated complex, Rule 5:4-2(j); authorized the filing of a non-conforming complaint with a supplement in such matters, Rule 5:4-2(i); and permitted the trial court to designate as complex non-dissolution cases that "cannot be heard in a summary manner" when "discovery, expert evaluations, extended trial time or another material complexity requires such an assignment," Rule 5:5-7(c). Cases not deemed complex remain summary actions. See R. 5:5-7(c) (reserving complex track procedures for "exceptional cases" ill-suited to be managed as summary actions).

In Major, 224 N.J. at 22, the Court recognized "the limitations imposed in summary actions may deprive a litigant of an opportunity to meet [their] burden under the statute and case law" in some cases and determined Rule 5:5–7(c) should govern grandparent visitation cases that warrant assignment to the complex track. The Court also acknowledged expert testimony may be necessary to allow the grandparent to satisfy its burden but cautioned trial courts to "be sensitive to the impact of expert involvement on family resources, protective of the privacy of the child, and mindful of an expert's potential value to the court and parties in suggesting a resolution of the dispute." Id. at 24-25.

We have considered the record against these legal principles and conclude the order granting Kara visitation rights must be reversed and the matter

remanded for further proceedings for the following reasons. First, the court erroneously considered the eight statutory factors under N.J.S.A. 9:2-7.1(b) before determining whether Kara carried her "heavy burden" of establishing as a "threshold" matter Ann and Sally would suffer clear, specific, and concrete harm if visitation was denied. Major, 224 N.J. at 18. Although we acknowledge, upon prompting from Joan's counsel, the court ultimately identified the purported specific harm to the children, it appears that finding was made through the prism of the N.J.S.A. 9:2-7.1(b) factors and general "best interests" considerations as opposed to the more exacting threshold requirements mandated by Moriarty, 177 N.J. at 117, and reaffirmed by Major, 224 N.J. at 7.

Second, in addressing the identifiable harm to Ann and Sally, the court did not resolve expressly the significant and material disputes in the parties' testimony that directly related to Kara's relationship with Ann and Sally and the potential harm should their contact with Kara be terminated. For example, Kara testified, as did Kyle, to her daily contacts with Ann and Sally since birth, including entire weekends, as well as her significant financial and emotional support to them, similar to the care she provides to Adam. Joan sharply disputed Kara's account, however, instead testifying Ann and Sally had limited contact with Kara, which occurred only while visiting their great-grandparents. Joan

also stated Kara removed her, Ann, and Sally from her home because Joan failed to pay rent, resulting in their residing in a shelter for victims of domestic violence, during which time Kara did not attempt to care for the children.

Similarly, in its analysis, the court seemed to credit Joan's argument that Kara lacked a relationship with the girls but acknowledged it could not determine, based on the testimony alone, whether Joan, Kara, or both parties were responsible for that failed relationship. Resolution of these factual disputes is necessary to an informed understanding of Kara's relationship with Ann and Sally and to the issue of whether the granddaughters would suffer specific and concrete harm should visitation be denied.

Accordingly, we reverse the May 16, 2022 order and remand for the court to make additional factual findings and legal conclusions consistent with Major, 224 N.J. at 7. Specifically, the court should first determine whether Kara made a showing Ann and Sally would suffer identifiable harm if they did not visit her. If so, the court should then consider the N.J.S.A. 9:2-7.1(b) factors to determine if the best interests of Ann and Sally warrant visitation, and under what circumstances.

As to Joan's second point, we agree it was error to proceed to a plenary hearing without first considering whether the matter should be placed on a

complex track pursuant to Rule 5:5-7(c) and if discovery was appropriate and necessary to resolve the issues before the court. See R.K., 434 N.J. Super. at 133; J.G. v. J.H., 457 N.J. Super. 365, 372 (App. Div. 2019). On remand, the court shall consider if the matter should be deemed complex under Rule 5:5-7(c), and if discovery, in camera interviews of Ann and Sally, or the appointment of an expert or guardian ad litem under Rule 5:8B, is appropriate under the circumstances. We, of course, give no direction that such an appointment be made, but leave it to the judge's discretion.

The court's May 16, 2022 order is reversed and the matter is remanded for further proceedings. We do not retain jurisdiction.

I hereby certify that the foregoing
is a true copy of the original on
file in my office.



CLERK OF THE APPELLATE DIVISION