

RECORD IMPOUNDED

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SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION DOCKET NO. A-3382-20

G.T.,

Plaintiff-Appellant,

v.

D.D.,

Defendant-Respondent.

Submitted October 13, 2022 – Decided February 7, 2023

Before Judges Gooden Brown and DeAlmeida.

On appeal from the Superior Court of New Jersey,
Chancery Division, Family Part, Cumberland County,
Docket No. FD-06-0886-20.

G.T., appellant pro se.

Respondent has not filed a brief.

PER CURIAM

In this one-sided appeal, plaintiff G.T. (Grandmother) appeals from the June 17, 2021 order of the Family Part denying her application for visitation

with her maternal granddaughter (Grandchild).¹ We affirm the order in part, vacate the order in part, and remand for further proceedings.

I.

Grandmother is the mother of defendant D.D. (Mother), who gave birth to Grandchild in 2009. On May 26, 2020, Grandmother filed an emergent application in the Family Part seeking joint custody of, and parenting time with, Grandchild under the Grandparent and Sibling Visitation Statute, N.J.S.A. 9:2-7.1 (the Act), and as a psychological parent, see V.C. v. M.J.B., 163 N.J. 200 (2000). According to Grandmother, she has been providing care to Grandchild since shortly after her birth, when Mother suffered post-partum psychosis which led to bi-polar disorder. She alleged that Grandchild lived with her for long periods, and that she consistently provided her with shelter, necessities, vacations, and emotional and educational support. Grandmother alleged that Grandchild had been residing with her for approximately a month after virtual schooling was implemented because of the COVID-19 pandemic when Mother removed the child from her home without reason. According to Grandmother, Mother has prevented her from having contact with the child since the removal.

¹ We use initials to identify the parties in order to preserve the confidentiality of these proceedings. R. 1:38-3(d)(1).

The application resulted in a June 9, 2020 order reflecting the parties' agreement that Grandmother would have liberal visitation with Grandchild. She was also allowed to take Grandchild on vacation to Florida and to communicate with her electronically. Satisfied with the order, Grandmother withdrew her application for joint custody.

Four months later, on October 8, 2020, Grandmother filed an emergent application to enforce the June 9, 2020 order. She alleged that Mother failed to comply with the order by refusing to allow her to visit or speak with Grandchild. As a result, Grandmother alleged, Grandchild's mental state had deteriorated rapidly. Mother opposed the application, alleging that Grandmother persistently interfered with her relationship with her child with constant communications and attempts to thwart Mother's parenting authority. The court converted the emergent application to a motion for visitation with Grandchild.

After a December 1, 2020 hearing, the court entered an order allowing Grandmother to communicate with Grandchild over a computer application three days a week for not more than thirty minutes at a time and when the child is visiting with her grandfather. The court also ordered the Division of Child Protection and Permanency to obtain a report for in camera review concerning ongoing counseling between Mother and Grandchild that had been ordered after

an attempted molestation of Grandchild by Mother's half-sibling while the child was in Mother's care.

On March 9, 2021, the trial court held a hearing at which both parties testified. No exhibits were marked or admitted as evidence during the hearing. After the hearing, the court entered an order continuing Grandmother's contact with Grandchild through computer applications. In addition, the court ordered: (1) the production of counseling records relating to Grandchild; (2) the production by Grandchild's school district of her education records; and (3) the scheduling of an interview of Grandchild by the court.

On June 17, 2021, the trial court issued a written opinion, which it read into the record, denying Grandmother's application. The court made the following findings of fact. Although Mother has always had custody of Grandchild, Grandmother spent considerable time helping to raise the child since the time of her birth. This included Grandmother caring for Grandchild for weeks, and sometimes months, at a time, taking her on trips, providing necessities, and planning birthday parties.

Despite the warmth between Grandmother and Grandchild, Grandmother and Mother maintained a cold relationship. Mother believes Grandmother interferes with her parenting of Grandchild by, among other things, making

plans for the child, which Mother sometimes has to cancel, causing strife with the child. In addition, Mother believes Grandmother wishes to usurp her role as parent. Grandmother believes Mother suffers from a mental health condition that causes her to have periods of mania and depression, which prevent her from providing the child with a stable household. Grandmother testified that when the child is with her Mother, she does not attend school regularly, does not complete her homework, stays up all night, sleeps in her school uniform, which she then wears to school the next morning, and does not maintain her personal hygiene. According to Grandmother, when the child resides with her, these issues are largely ameliorated.

With respect to whether Grandchild would be harmed if Grandmother was denied visitation, the trial court, relying on the holding in Daniels v. Daniels, 381 N.J. Super. 286, 295 (App. Div. 2005), found that Grandmother

has . . . demonstrated that she has a substantial relationship with the child – speaking to her regularly and playing an important role in her upbringing. While not forming a parent-like relationship, [Grandmother] certainly appears to have become an integral part of the child's regular weekly routine. Accordingly, [Grandmother], has met her burden of showing that visitation could be necessary to avoid a specific, identifiable harm to [Grandchild].

In addition, the court found that Grandchild can engage in tantrums, screaming, and yelling when triggered by interactions with Mother and has a recognized need to develop skills to cope with and control her anger. Grandmother, the court found, had previously been identified in a family crisis plan as a resource for Grandchild when she is in crisis. The absence of Grandmother in such circumstances, the court found, may cause harm to Grandchild.

Having found that the child would be harmed by a denial of visitation, the court applied the statutory best interests analysis to determine whether to override Mother's parental prerogatives by granting Grandmother's application. The court found:

(1) a significant, positive relationship between Grandmother and Grandchild. The court noted that during her interview with the court, Grandchild said that she saw Grandmother nearly every day and would like to see her a few times a week;

(2) an unhealthy relationship between Grandmother and Mother;

(3) Grandmother has consistently remained in contact with Grandchild, until the court limited her to virtual communications;

(4) "that as well-intended as [Grandmother's] actions may be, her visitation with [Grandchild] causes conflict in the mother-daughter relationship.

Rather than work alongside [Mother] to support [Grandchild], it appears [Grandmother] would like to sideline [Mother] and raise the child herself." The court found that "this arrangement cannot stand." As the court explained, as Mother's "fitness as a parent has not been overcome, her right to raise the child is paramount" to Grandmother's interest in visitation;

(5) visitation by Grandmother will not have an effect on the relationship of Grandchild's parents, who are separated, with the child's father absent;

(6) Grandmother's application was made in good faith;

(7) although Grandmother "has not been abusive toward [Grandchild], her conduct toward other parties is concerning to the court. The serious allegations of [Grandmother's] drinking, including voicemails, text messages, and other media submitted for the court's review, present [Grandmother] in a light that is less than becoming for a grandmother." The court found that "[t]hese allegations are corroborated by a recent Superior Court complaint against her, concerning accusations of domestic violence. Indeed, the court entered a Final Restraining Order [(FRO)] against [Grandmother] in May 2021, for harassment of a third party." The court found that the FRO "demonstrates [Grandmother's] unwillingness to compromise with other parties or allow them to exercise their rights over her will." The court concluded that the conduct

underlying the FRO "is certainly not in the child's best interests." Weighing these factors, the court found that Grandmother failed to demonstrate that visitation over Mother's objection was in Grandchild's best interest.

In a footnote, the trial court also rejected Grandmother's claim she should be granted visitation because she is the psychological parent of Grandchild. The court concluded that the record clearly established that Grandmother always helped care for the child in the role of grandmother, as recognized by Grandmother, Mother, and Grandchild, while Daughter has always maintained the role of parent. A June 17, 2021 order memorializes the court's decision.

The appeal follows. Grandmother argues: (1) the trial court's decision is not supported by the record; (2) the judge ignored critical evidence; (3) the judge relied on his personal experiences when making his decision; (4) the judge acted during the trial in a manner indicative of bias against Grandmother; (5) the court's findings with respect to her alcohol use are based on evidence that was not admitted at the hearing, subject to cross-examination, or provided to Grandmother or her attorney.

II.

Our limited scope of review of the trial court's findings is well established. See Cesare v. Cesare, 154 N.J. 394, 411 (1998). We accord deference to the

Family Part due to its "special jurisdiction and expertise" in the area of family law, and 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)).

We begin with Grandmother's claim to be the psychological parent of Grandchild. In order for a third party to obtain the status of psychological parent, "the legal parent must consent to and foster the relationship between the third party and the child; the third party must have lived with the child; the third party must perform parental functions for the child to a significant degree; and most important, a parent-child bond must be forged." V.C., 163 N.J. at 223. "What is crucial here is not the amount of time but the nature of the relationship." Id. at 226. "Once a third party has been determined to be a psychological parent to a child . . . he or she stands in parity with the legal parent." Id. at 227.

Having carefully reviewed the record, we agree with the trial court's conclusion that Grandmother did not establish that she is the psychological parent of Grandchild. The record is replete with evidence establishing that while Grandmother contributed to the care, nurturing, and emotional, physical, and

educational needs of Grandchild, she did so in the role of grandmother, not parent. Grandmother, Mother, and Grandchild recognized that Grandmother was not Grandchild's parent and acted as a support for Mother's parenting of the child. We, therefore, affirm the June 17, 2021 order to the extent that it denies Grandmother's claim to be Grandchild's psychological parent.

With respect to Grandmother's application for visitation under the Act, we are guided in our analysis by the legal principles set forth in Moriarty v. Bradt, 177 N.J. 84, 117 (2003), and reaffirmed in Major v. Maguire, 224 N.J. 1, 7 (2006). A grandparent seeking visitation under the Act over the objection of a fit parent "must prove by a preponderance of the evidence that denial of visitation will harm 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, 381 N.J. Super. at 294.

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 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.

As the Supreme Court explained,

[t]he grandparent's 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 long-standing 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.

[Moriarty, 177 N.J. at 117.]

In addition,

proof of harm involves a greater showing than simply the best interests of the child. Id. 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. The following factors must be considered by the court when undertaking 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.

[N.J.S.A. 9:2-7.1(b).]

In addition, "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. 9:2-7.1(c).

Our review of the record reveals sufficient support for the trial court's conclusion that Grandchild will suffer harm if Grandmother's application for visitation is denied. Mother does not dispute that Grandchild has a significant, long-term relationship with Grandmother. Nor does she deny that Grandmother spent extended periods caring for Grandchild, both when the child lived with Grandmother during the COVID-19 pandemic, and during vacations, day trips, holidays, and overnight stays at Grandmother's home. Grandmother and Grandchild communicated frequently, so much so that Mother found the Grandmother's contact with the child to be an interference with her parenting. In her interview with the court, Grandchild expressed her desire to remain in regular contact with Grandmother.

The trial court erred, however, in its analysis of the statutory factors applicable to Grandmother's application for visitation. Relying on "voicemails, text messages, and other media submitted for the court's review," the trial court found that there were "serious allegations" about Grandmother's consumption of alcohol that weighed against granting her application. The court does not identify with precision any of the evidence on which it relied to make this finding. This court cannot, therefore, determine if that evidence is competent, relevant and reasonably credible.

A review of the trial transcript does not reveal the evidence on which the court's conclusion might be based. In fact, at the March 9, 2021 hearing not a single exhibit was marked or admitted as evidence. As Grandmother aptly argues, it is apparent that the trial court relied on evidence that she did not have the opportunity to contest or explain at trial, was not subject to cross-examination, or found to be admissible under the rules of evidence.²

The court's reliance on evidence that is not in the record is compounded by its failure to make findings of fact with respect to conflicting testimony at

² Because the evidence on which the trial court relied was not admitted at the hearing, it is not included in Grandmother's appendix. Grandmother included in her appendix text messages and other materials not admitted at the hearing. Those materials do not concern Grandmother's consumption of alcohol and were not considered by this court because they are not part of the record.

the hearing with respect to Grandmother's consumption of alcohol. Mother testified that Grandmother took the child with her to a bar and suspected Grandmother was consuming alcohol on that occasion. Grandmother testified that on the day in question she took Grandchild to a social club, which has a bar, for an afternoon children's event and did not consume alcohol. Grandmother also testified that she never consumes alcohol while caring for Grandchild. In the absence of credibility determinations and fact finding, it is not possible for this court to determine whether Grandmother gave a truthful account of her consumption of alcohol while caring for Grandchild.

The trial court also erred when it relied on an FRO entered against Grandmother in a separate matter in May 2021, two months after the hearing. Because the FRO was entered after the hearing, Grandmother did not have an opportunity to challenge its admission, explain the events that resulted in its entry, or contest its relevance to her application for visitation. It is not clear how the trial court came into possession of the FRO or what knowledge the court had with respect to the facts leading to its entry.³

³ The FRO on which the trial court relied was not included in Grandmother's appendix and has not been reviewed by this court.

It was fundamentally unfair for a trial court to rely on evidence that was not admitted at trial and to rely on an FRO order entered in another matter after the trial without giving Grandmother an opportunity to be heard with respect to the relevancy of that order. In light of these errors, we are constrained to vacate the June 17, 2021 order to the extent that it denied Grandmother's application under the Act.

We remand for a new hearing on Grandmother's application for visitation with Grandchild under the Act. Given the passage of time, and the fact that Grandchild has entered her teenage years, the proceedings on remand shall decide Grandmother's application in light of the current status of the parties and Grandchild. We offer no opinion with respect to the admissibility or relevance of the unadmitted evidence and FRO upon which the trial court relied, should that evidence be proffered at the remand proceedings.

To the extent we have not addressed any of Grandmother's remaining contentions, we conclude they lack sufficient merit to warrant discussion in a written opinion. R. 2:11-3(e)(1)(E),

The June 17, 2021 order is affirmed in part and vacated in part. The matter is remanded for further proceedings consistent with this opinion. 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