

FILED

AUG 19 2019

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

No. 36834-3-III

IN THE COURT OF APPEALS
FOR THE STATE OF WASHINGTON
DIVISION III

In re the Visits with:
RV, MV, CV, MV

KATHERINE NARAVANE
YASHODHAN NARAVANE,

Appellants,

and

MICHAEL VINTHER,

Respondent.

APPELLANTS' OPENING BRIEF

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A. ASSIGNMENT OF ERROR

The trial court erred and abused its discretion by dismissing the petition for relative visitation with the grandparents here after a court review under Chapter 26.11 RCW without oral argument when the record created by the Petitioning maternal grandparents clearly met the burden of proof required to proceed to a full hearing on the matter.

Furthermore, the trial court further erred and abused its discretion in finding that the basis for the denial was simply that the Petitioners did not show “it is more likely than not that the Petition for Visits will be granted”, without making any factual findings or creating any sort of record, written or oral, to support this decision of the trial court judge.

B. ISSUES PERTAINING TO ASSIGNMENT OF ERROR

Did the trial court err and abuse its discretion by dismissing the petition for visitation when the record supported proceeding to a full hearing on the matter?

Did the trial court err and abuse its discretion by failing to make any findings, written or oral, regarding the petition for visitation, which in turn failed to create a record for review?

C. STANDARD OF REVIEW

Thus far there is no explicit standard of review for the newly enacted Ch. 26.11 RCW in case law. However, on review in cases involving child custody, the Appellate Court carries out consideration of a trial court's decision based on an abuse of discretion. *In re Marriage of Landry*, 103 Wn.2d 807, 809-10, 699 P.2d 214 (1985) (internal citations removed).

Findings of fact are reviewed by the appellate court for substantial evidence supporting the decision, and on appeal, a trial court's ultimate determination will not be reversed "unless the court exercised its discretion in an untenable or manifestly unreasonable way." *In re the Marriage of McDole*, 122 Wn.2d 604, 610, 859 P.2d 1239 (1993). Upon review, "[a] trial court abuses its discretion when its decision is manifestly unreasonable or based on untenable grounds." *In re Marriage of Kovacs*, 121 Wn.2d 795, 801, 854 P.2d 629 (1993).

D. STATEMENT OF THE CASE

This appeal from a denial of a petition for relative visitation involves four children: RV, MV, CV, and MV.¹ (CP at 195). The

¹ The children here will be referred to by their initials to respect their privacy as minors, and throughout the brief will be referred to as "the children" for ease of reading by the Court.

Respondent, Michael Vinther, is the children's biological father. (CP at 2, 23). Mr. Vinther and Ms. Angela Vinther, the children's deceased biological mother, were married for 13 years before separating, and altogether for 15 years at the time of her death in 2016. (CP at 14, 30). The Appellants, Katherine and Yashodhan, are the maternal relatives of the children, related by blood and marriage respectively. (CP at 32, 76).

Ms. Naravane has known Mr. Vinther from the age of 14, and because of this she considered him a beloved family member. (CP at 14, 88, 184). However, Mr. Vinther had an alcohol addiction that persisted for many years coupled with mental health concerns involving PTSD and suicidal ideations. (CP at 15, 77, 184). Despite Ms. Naravane's insistence on an intervention in 2011, it did not take place due to Ms. Vinther's and Mr. Vinther's family being concerned about the effect it would certainly have on his military career. (CP at 15). Ms. Naravane had no choice but to yield to their wishes and not coordinate the intervention. (CP at 15).

In June 2015, Ms. Vinther tried to find assistance in ways that would not affect Mr. Vinther's career, and after speaking to someone from the Family Advocacy Program, she made the

decision to take the children and live in a shelter for domestic violence victims in July 2015. (CP at 14, 15). In November 2015 Ms. Vinther moved to Wallowa, Oregon and took the children with her. (CP at 30). A divorce action was later filed by Ms. Vinther in June 2016. (CP at 30). The children then moved into the Naravanes' home in August 2016. (CP at 16, 184).

Mr. Vinther attempted sobriety for the summer of 2015, but by April 2016 he had relapsed and, in the fall of 2016, further stated he was “just” drinking socially. (CP at 15). The Naravanes had concerns about any alcohol consumption for someone with a dependence problem, such as Mr. Vinther and the effect this had on their family. (CP at 15). Although Mr. Vinther had problems and it was tough for them to feel this way, the Naravanes always remained supportive of Mr. Vinther and encouraged contact and a relationship with the children. (CP at 16-17).

There were also concerns about his history of mental health and the ways in which it affected the children. For example, one of the children suffered anxiety and nightmares after overhearing a statement Mr. Vinther made about committing suicide, which only grew worse after the death of Ms. Vinther. (CP at 16). Mr. Vinther suffer greatly in 2015 with his abuse coming to a head. (CP at 15).

Despite the separation, the Naravanes strongly supported Mr. Vinther to come to terms with and fight his alcohol addiction to attempt to maintain some semblance of a relationship with the children. (CP at 14, 166). Yet, from 2015 until late 2016 for a period of about 18 months Mr. Vinther had little to no contact with them, disintegrating what remaining relationships he had. (CP at 14, 16, 17, 184). Mr. Vinther does not describe seeing the children to try to work out how they would “transition into the future as a family” until November 2016, not even knowing at that point the children had been with the Naravanes for months. (CP at 16, 30-31, 86).

In October 2016 the children’s mother, Mr. Vinther’s wife, and the Naravanes’ daughter Ms. Angela Vinther committed suicide. (CP at 10, 30). At this point the children had already been living in the Naravanes’ home since August. (CP at 16, 86). At that time, the children were terrified of their father’s behaviors and level of substance abuse. (CP at 16-17).

Within two days of the death of Ms. Angela Vinther, Mr. Vinther made his relationship with his girlfriend Ms. Cheyenne

Reynolds² public on Facebook. (CP at 11). Since the Naravanes had placement of the children at the time, they were able to witness the negative effect that this had on the children, two of which saw the Facebook post. (CP at 11). Shortly thereafter Mr. Vinther and Ms. Reynolds moved in together, along with her three children. (CP at 11-12).

Mr. Vinther attempted to begin rebuilding his relationship with his children but always appeared to push it beyond what the children were comfortable with. (CP at 17). Mr. Vinther informed Ms. Naravane shortly after Ms. Vinther's death that he intended to remove any reminders of Ms. Vinther from his home because of the traumatic way she died. (CP at 12). But this would essentially erase her from the children's memories by removing her things from the home, which was done without any discussion whatsoever with the children. (CP at 12, 88).

Temporary custody was granted on November 4, 2016 under cause number 16-3-00259-0 in Walla Walla County which restrained Mr. Vinther from relocating with the children and kept placed them with the Naravanes for the time being. (CP at 39-44).

² Now known as Mrs. Cheyenne Vinther, she will be referred to as Ms. Reynolds for the sake of clarity throughout this brief and out of respect for the Naravanes' deceased daughter, Ms. Angela Naravane.

This order remained in place until December 22, 2016 when the court required that they turn the children over to Mr. Vinther's care on Christmas Day and denied the petition for third party custody. (CP at 11-12, 14, 16, 31, 39-44).

When the Naravanes had custody of the children it was clear that all four of them were suffering mentally, emotionally, and acting out behaviorally in various ways. (CP at 17, 18). It was not possible for the Naravanes to understand the depth of the negative effect Mr. Vinther's choices and health had on the children until they were in fact living in their home. (CP at 18).

Mr. Vinther moved all of the children in with his new significant other and her children. (CP at 11, 18). At this point, this new blended family from the perspective of the children contained two adults, a father who had longstanding substance abuse and mental health concerns and a stepmother they barely knew, as well as a total of seven children altogether. (CP at 18).

Thereafter Mr. Vinther rebuffed any attempts at them having contact with the children, despite many efforts at phone contact. (CP at 14, 18, 19, 81-83). This was admitted retaliation for the third-party custody petition. (CP at 18, 184). Mr. Vinther has not even allowed the Naravanes have a portion of their

daughter's ashes, while Mr. Vinther claims it is up to the children to decide what to do with the ashes one day. (CP at 167, 188).

After a year had gone by and some of the dust settled, the Naravanes had located where Mr. Vinther and the children had relocated to in Newport, Washington. (CP at 19). They drove up on Christmas 2017 to deliver presents, but shortly after arriving and being let in by the children we were asked by Mr. Vinther to leave immediately despite our attempts to calmly work to resolve the remaining conflict. (CP at 19, 81-83, 167, 185). Mr. Vinther felt this third-party custody filing by the Naravanes was inappropriate, thus he went to the length of removing the children's grandparents from their lives, and thus the last memories of their mother. (CP at 14, 88, 163, 185).

Based on their desire to maintain the relationships built with their grandchildren after being denied visitation, the Naravanes worked with Grandparents Rights of Washington to enact the current statutes upon which they are now bringing this appeal. (CP at 12, 18).

Thereafter, the Naravanes filed a Summons and Petition for visitation on November 19, 2018. (CP at 1-9). Although the Naravanes live in Walla Walla County, the petition was brought in

Pend Oreille County based on where Mr. Vinther was living with the children. (CP at 1-2). The Naravanes pled for visitation under Chapter 26.11 RCW, as blood relatives of Mr. Vinther's ex-spouse, his wife and the Naravanes' daughter. (CP at 2, 4).

The visits requested were as follows: "two weekends per month Friday to Sunday . . . one week-long visit each summer and half of winter break, [as well as] phone contact with the children on all major holidays and the children's birthdays." (CP at 5, 21).

Mr. Vinther responded to the petition on December 13, 2018 and asserted his position that he was strongly against any visitation. (CP at 22-28). At the same time, he also filed a motion for advanced lawyer fees along with a brief in support, that was disputed (CP 68-70, 73-75), which was granted after argument from their respective counsel on February 21, 2019 requiring the Naravanes to pay for Mr. Vinther's attorney. (CP at 50-53, 129-43, 155-56, 157-58).

This December 13, 2018 declaration written by Mr. Vinther painted a different picture of what he alleged had occurred.³

³ The Declarations of both Michael Vinther and Cheyenne Vinther do not have distinct docket sequence numbers and are listed on Odyssey and the Index to the Clerk's Papers filed in the Pend Oreille Superior Court on July 3, 2019 as "Declaration Affidavit Multiple". This makes it difficult to determine which of the two begins the clerk's pages numbering, which spans 29-49 respectively. The Appellants here will reference the Declaration of Michael Vinther as beginning at Clerk's Papers 29 and the Declaration of Cheyenne Vinther directly thereafter.

Believing that the Naravanes were painting a rosier picture than was warranted, Mr. Vinther argued essentially that the Naravanes were trying to steal his children through the non-parental custody action, that they lacked insight into and acceptance of their contribution to the situation between the parties, and that Ms. Vinther was experiencing serious difficulties preceding her suicide which the Naravanes were not entirely caused by him. (*See generally* CP at 29-44, 161-70). Ms. Reynolds filed supporting declarations as well alleging the same. (CP at 45-49, 171-76).

These allegations were strongly disputed by the Naravanes and multiple additional declarations and evidence was provided of such. (*See generally* CP at 76-128, 144-47, 182-89).

Mr. Vinther's attorney filed a motion to dismiss the action, however, that was not appropriate or warranted by the applicable statutes. (CP at 148-54).

Thereafter the Naravanes filed a request on March 20, 2019 for the court to review the file and motioned for leave to proceed to an evidentiary hearing on this matter, one which was likely to give the Naravanes visitation with the children. (CP at 159-60).

A formal request for review was filed on May 1, 2019. (CP at 188-89) and this was heard on May 3, 2019 without argument of

either counsel, without any sort of oral record of the Judge, and without any factual findings being made. (CP at 190-94).

The Honorable Judge Jessica T. Reeves of Pend Oreille erred when denying the petition and further erred by failing to create any oral or written record to support her decision. (CP at 190-94).

Thereafter, the Naravanes filed their Notice of Appeal on May 29, 2019 requesting that this Honorable Court determine whether the errors committed here support an abuse of discretion by the trial court. (CP at 195-201).

E. ARGUMENT

a. Current Washington Law Regarding Visitation with Minors for Non-Parents.

The current law governing the visitation of non-parent third parties is found in Chapter 26.11 of the Revised Code of Washington. The requirements to file such a petition are found specifically at RCW 26.11.020 and are listed below in its entirety:

- (1) A person who is not the parent of the child may petition for visitation with the child if:
 - (a) The petitioner has an ongoing and substantial relationship with the child;
 - (b) The petitioner is a relative of the child or a parent of the child; and
 - (c) The child is likely to suffer harm or a substantial risk of harm if visitation is denied.

(2) A person has established an ongoing and substantial relationship with a child if the person and the child have had a relationship formed and sustained through interaction, companionship, and mutuality of interest and affection, without expectation of financial compensation, with substantial continuity for at least two years unless the child is under the age of two years, in which case there must be substantial continuity for at least half of the child's life, and with a shared expectation of and desire for an ongoing relationship.

Once the filing of the Petition has commenced the court makes the decision whether an evidentiary hearing shall take place under RCW 26.11.030(8). The court reviews the affidavits and the Petition itself to make the determination if it would “more likely than not” grant visitation. If the court makes such a finding, then the matter shall be heard at an evidentiary hearing. If the court does not make this finding, then the Petition shall be dismissed. The Petitioners have moved for an evidentiary hearing. There is a sufficient basis before the court that an evidentiary hearing may be granted. If the court does not find a basis to move forward after the evidentiary hearing, then the case is moot.

**RCW 26.11.040 -- Orders granting visitation—
Factors for consideration by the court—Best
interest of the child—Presumption in favor of fit
parent's decision—Rebuttal.**

(1)(a) At a hearing pursuant to RCW 26.11.030(8), the court shall enter an order granting visitation if it finds that the child would

likely suffer harm or the substantial risk of harm if visitation between the petitioner and the child is not granted and that granting visitation between the child and the petitioner is in the best interest of the child.

(b) An order granting visitation does not confer upon the petitioner the rights and duties of a parent.

(2) In making its determination, the court shall consider the respondent's reasons for denying visitation. It is presumed that a fit parent's decision to deny visitation is in the best interest of the child and does not create a likelihood of harm or a substantial risk of harm to the child.

(3) To rebut the presumption in subsection (2) of this section, the petitioner must prove by clear and convincing evidence that the child would likely suffer harm or the substantial risk of harm if visitation between the petitioner and the child were not granted.

(4) If the court finds that the petitioner has met the standard for rebutting the presumption in subsection (2) of this section, or if there is no presumption because no parent has custody of the child, the court shall consider whether it is in the best interest of the child to enter an order granting visitation. The petitioner must prove by clear and convincing evidence that visitation is in the child's best interest. In determining whether it is in the best interest of the child, the court shall consider the following, nonexclusive factors:

(a) The love, affection, and strength of the current relationship between the child and the petitioner and how the relationship is beneficial to the child;

(b) The length and quality of the prior relationship between the child and the petitioner before the respondent denied visitation, including the role performed by the petitioner and the emotional ties that existed between the child and the petitioner;

(c) The relationship between the petitioner and the respondent;

(d) The love, affection, and strength of the current relationship between the child and the respondent;

(e) The nature and reason for the respondent's objection to granting the petitioner visitation;

(f) The effect that granting visitation will have on the relationship between the child and the respondent;

(g) The residential time-sharing arrangements between the parties having residential time with the child;

(h) The good faith of the petitioner and respondent;

(i) Any history of physical, emotional, or sexual abuse or neglect by the petitioner, or any history of physical, emotional, or sexual abuse or neglect by a person residing with the petitioner if visitation would involve contact between the child and the person with such history;

(j) The child's reasonable preference, if the court considers the child to be of sufficient age to express a preference;

(k) Any other factor relevant to the child's best interest; and

(l) The fact that the respondent has not lost his or her parental rights by being adjudicated as an unfit parent.

The Naravanes followed the proper court procedure under the applicable statutes. Despite this case going to court review with substantial evidence in the court record supporting the Naravanes' position, the Court determined the Naravanes had not met their burden and dismissed the petition without hearing. (CP 195-201).

Without any factual findings made by the trial court, it is extremely difficult to attempt to narrow the issues for review here. Thus, it is important to note that the main argument here is not intended to ask to relitigate the case on appeal by asking the Court of Appeals to substitute its discretion for that of the trial court. Yet, there are no findings from the trial court upon which to argue from as the basis for review here so without that information, a general public policy and legislative intent approach is necessary to support the appeal and highlight why this case is unique.

The sheer length of time that non-parental visitation has been in place in Washington through various statutes supports the necessity of the law and the public's desire for such. (*See* Section b *infra*). This case involving the Naravanes is an opportunity for this Honorable Court to clarify the intent and practical procedures regarding the newly enacted relative visitation statutes.

b. History Behind Non-Parental Visitation in Washington.

In Washington, as in other states as well, there is significant and longstanding law regarding non-parental visitation. This reflects in some substantial manner the notion that both the legislature and the public recognize and want to codify the importance of familial relationships beyond the parents. *See*

generally In re Custody of Smith, 137 Wn.2d 1, 8-12, 969 P.2d 21 (1998) (extensive discussion regarding history of visitation laws).

The government has authority under *parens patriae* to consider potential harm to children and grants the state authority to act in certain circumstances. *In re Smith*, 137 Wn.2d at 16-17, (citing Joan C. Bohl, *The “Unprecedented Intrusion: A Survey and Analysis of Selected Grandparent Visitation Cases*, 49 Okla. L. Rev. 29 (1996)). Although there are not any common law rights to grandparent visitation, every single state in this country allows for some manner of third-party relative visitation. *See generally* Terra L. Henry Sapp, *Grandparent Visitation Statutes in the Aftermath of Troxel v. Granville*, 17 J. Am. Acad. Matrimonial L. 121 (2001).

The applicable and updated statutory law as outlined above is in fact not Washington’s first endeavor at enacting legislation for grandparents to legally petition for time with their grandchildren. The first attempt was under RCW 26.09.240 enacted back in 1973, allowing non-parents to intervene in pending divorce or legal separation cases to request court authorized visitation with children. (*See* Senate Bill Report SB 5598, at 1 (Jan. 11, 2018); *see also In re Smith*, 137 Wn.2d at 8-12). This required evidence that

visitation be in the best interests of the child and that a significant relationship existed. *Id.* at 1-2.

This law was amended over the course of twenty years, and in 1996 was modified to include a presumption in favor of a petitioning grandparent being granted visits and placed the burden on a parent to show that visits in some manner would endanger the child's health, mental or physical. *Id.* at 2. This standard required the parent to show "more likely than not" that such harm to the child would occur. *Id.* It is important to note that this amendment was very specific as to the petitioner who was benefitting and did not allow persons other than grandparents to receive this presumption, despite the fact that "anyone" could petition for visits. *Id.* The concern involves infringement on parents' rights.

However, the landmark U.S. Supreme Court case of *Troxel v. Granville*, 530 U.S. 57, 120 S. Ct. 2054, 147 L. Ed. 2d 49 (2000) found unconstitutional a Washington statute which allowed "any person" to ask a court for visitation with a minor under RCW 26.10.160(3) when that visitation is considered to be in the best interests of that child. Two grandparents suffered the loss of their adult son from suicide, who had been living with them after separating from his partner. *Troxel*, 530 U.S. at 60. During the few

years their son lived with them, he often had his two children there for his residential time, and in turn the grandparents saw their grandkids frequently. *Id.* After their son's death, this regular contact continued for nearly 6 months before the mother attempted to limit the time to an average of one visit a month. *Id.* at 60-61.

However, the grandparents wanted more time and petitioned for visits under both RCWs 26.09.240 and 26.10.160(3), although only the second was reviewed. *Troxel*, 530 U.S. at 61. Ultimately, the Supreme Court upheld the State Supreme Court and found that this statute unconstitutionally interfered with parent's right to child rearing and that it was overbroad. *Id.* at 63.

The visitation statutes in Washington have since been repealed and reenacted over the course of more than four decades with language specifically tailored at addressing the overbreadth of the previous statutes and taking into consideration the overarching constitutional parental rights to raising their children.

The distinction in *Troxel* is that there the parent did not oppose visitation altogether, only disputed the amount of time that was petitioned for, and the parent there recognized the importance of maintaining that familial relationship. *Id.* at 61. Here however, visitation is being disputed in its entirety. (CP at 29-44, 45- 49,

161-70, 171-76). The legislature may defer to a fit parent's decisions, but still must take each case based on its unique facts in consideration of the relevant law.

The U.S. Supreme Court agreed with the Washington State Supreme Court, and further found that:

the Federal Constitution permits a State to interfere with [a parent's fundamental right to rear their children] only to prevent harm or potential harm to the child, it found that § 26.10.160(3) does not require a threshold showing of harm and sweeps too broadly by permitting any person to petition at any time with the only requirement being that the visitation serve the best interest of the child.

530 U.S. at 57. The U.S. Supreme Court referred to this allowance of any person to petition as "breathtakingly broad", without a doubt infringing upon Fourteenth Amendment due process rights and heightened protections. *Id.* at 57. This issues with overbreadth have been corrected in the current laws under Chapter 26.11 RCW.

Moreover, the statute as in *Troxel* gave the burden to the petitioner over a fit parent and gave no weight to that fit parent's determination of the best interests of the child. *Id.* at 58. Notably, the Court held "the State lacks a compelling interest in second-guessing a fit parent's decision regarding visitation with third parties." *Id.* at 59. This was the heart of the infringement.

This RCW 26.09.240 was not repealed until 2018 when Senate Bill 5598 regarding relative visitation was enacted and recodified under Chapter 26.11 *et seq.* (2018 Wash. Sess. Laws Regular Session Sixty-Fifth Legislature, (Jan. 8 to Mar. 8, 2018), <http://leg.wa.gov/CodeReviser/documents/sessionlaw/2018pam2.pdf>). The Court may look to the Senate Bill Report SB 5598 cited as evidence of legislative history in support of the Naravanes' position requesting review of the petition for visitation and for the intent of the related statutes at issue in this appeal. *State v. Reding*, 119 Wn.2d 685, 690, 835 P.3d 1019 (1992).

This current legislation for relative visitation is the focus of this appeal and notably is one of the first appellate court reviews of the updated statutory law for grandparent's visitation. The facts of *Troxel* are eerily similar to the facts here, involving the death of a parent by suicide and the dispute over visitation with that person's own parents and their children. 530 U.S. at 60-61. This gives the Court an opportunity to review this unique case and determine whether there is an issue with the lack of a requirement to make findings regarding a grandparent's petition for visitation.

c. **This Court Must Reverse the Trial Court's Decision Finding that the Petition for Visitation could not Proceed Because the Naravanes Had Not Met Their Burden of Proof.**

It is undisputed that the children resided with the Naravanes in the time immediately preceding and following Ms. Vinther's death in October 2016. (CP at 16, 86). The Court file shows extensive evidence that Mr. Vinther was not forthcoming in his pleadings and attempted to paint an inaccurate picture of himself for his own benefit, for example regarding text messages and alleged harassment that never occurred. (CP at 83). It is also undisputed that the Naravanes had a substantial and ongoing relationship with the children, (although Mr. Vinther challenged Mr. Naravane's relationship as "not longstanding") and Mr. Vinther gave no independent evidence other than his own wife, Ms. Reynolds to dispute the Naravanes' claims. (CP at 32).

It is important to note that the Court now cannot make weigh evidence or make determinations of credibility on appeal. *In re the Marriage of Rich*, 80 Wn. App. 252, 259, 907 P.2d 1234 (Div. III 1996). However, since the trial court make no findings whatsoever, it is impossible to know what the trial court weighed and what decisions it made regarding credibility.

This supports a finding that the trial court manifestly abused its discretion in failing to make any findings in the record, especially when review of such record clearly supports that the trial court made the incorrect determination. The history of the relative visitation statutes is addressed above to express to the court the importance that Washington State believes relationships beyond just parental roles are fundamentally important. For lack of a better phrase, it truly takes a village to raise a child and this was something that the Naravanes took to heart in helping to raise and continue their relationships with all of the children here.

Since Washington State views and has enacted legislation for decades attempting to allow third party visitation (specifically grandparents) without circumventing parental rights altogether, it is important for this court to consider the effect that this case could have on the cases that will most certainly follow.

1. Ongoing and Substantial Relationship

The Naravanes have had an ongoing and substantial relationship with all four of the children prior to their mother's death that existed for years. (CP at 10-11). These grandparents are essentially the last familial link that these kids have to their mother. This relationship with the children was perpetuated and

further strengthen based on Mr. Vinther's substance abuse and mental health history which placed the children with them temporarily after Ms. Vinther's death. (CP at 11, 14, 16, 17, 184). This relationship is relatively undisputed in the record.

The Naravanes have been an integral part of the children's lives. Ms. Naravane, as Ms. Vinther's biological mother, was close or present during each of the children's births and has been a consistent and present figure in their lives. (CP at 13). Ms. Naravane has extensive experience working as a mental health counselor, which translated into being able to assist the children in working through emotions and communication in positive and healthy ways. (CP at 13, 32).

For example, while their mother was still alive the second oldest child disclosed to her that he had been bullied at school to the extent of being suicidal. (CP at 14). Then their grandmother, Ms. Naravane successfully petitioned the Air Force School Board to transfer the children to the school on the base, something Mr. and Ms. Vinther had done unsuccessfully. (CP at 14).

Mr. Naravane assisted all of the children considerably with their studies viewing it as greatly important to their development, (CP 77), and also had a special bond with the youngest of the

children. (CP at 13). He had a special bond with each of the children and knew them for over a decade. (CP at 76-77).

It is very clear from the record that prior to the third-party custody action when Mr. Vinther cut off all contact between the children and the Naravanes that there was an ongoing, healthy, and loving relationship between the children and both Petitioners for years. (CP at 11-12, 14, 16, 31, 39-44). The Naravanes had spent time with the children prior to their mother's death and had a strong bond with each of them. (CP at 13). Moreover, at the time that Ms. Vinther died, Mr. Vinther was not even with the children – they had been in the Naravanes care for months. (CP at 16, 86).

As the record also reflects, these relationships with the children were very much contested by Mr. Vinther and in fact claimed harm had come to the children at their hands. (CP at 29-44, 161-70). Many declarations were submitted by the Naravanes to the contrary, including photographs refuting some of his allegations. (*See generally* CP at 76-128, 144-47, 182-89). However, it appears that the Trial Court was still persuaded by Mr. Vinther's argument in some manner, although without appropriate findings made by the trial court in the record the Naravanes are not unable to say exactly what the court was influenced by.

It is understood that the trial court is required to give deference to the parents in these types of visitations proceedings. However, the Naravanes here have clearly met their burden of proof, are applicable petitioners under the statute, had substantial and longstanding relationships with the children many years prior to this action taking place and harm would come to the children based on their circumstances if visits were denied.

Since there are no findings upon which to specifically challenge on appeal, it is difficult to use case law to attempt to argue that this requirement has been met.

2. Harm to the Children If Visits are Denied

The Washington law requires that the court determine that harm would come to the children if the Naravanes were not granted visitation. This has been interpreted as above what is in the best interests of the children and harm can occur from severing a grandparent's relationship with them, especially if one parent has passed away. Lauren F. Cowan, *There's No Places Like Home: Why the Harm Standard in Grandparent Visitation Disputes Is in the Child's Best Interests*, 75 *FORDHAM L. REV.* 3137, 3153-57 (2007). A similar New Jersey case in 2003 found that after a mother had died, it was important to continue the children's

visitation and maintain that relationship with the maternal grandparents as “they had no other way to stay connected to the memory of their mother.” Cowen *supra*, at 3154-55 (citing *Moriarty v. Bradt*, 827 A.2d 203, 177 N.J. 84 (2003)).

At the time of filing the petition, Mr. Vinther had been denying the children any contact with their mother’s side of the family for almost 2 years. (CP at 29-44, 161-70). Mr. Vinther attempted to argue that the Naravanes had caused substantial emotional and psychological harm to the children but provided essentially no evidence to substantially support that position. (*See generally* CP at 29-44, 45-49, 161-70, 171-76). In fact, the Naravanes provided extensive information and declarations that contradicted Mr. Vinther and Ms. Reynolds’ statements. (*See generally* CP at 76-128, 144-47, 182-89). There is no evidence and certainly no findings in the record that support that any harm to the children whatsoever occurred at the hands of the Naravanes.

In turn, the only harm that was and is affecting the children is the harm that Mr. Vinther is perpetuating by removing the Naravanes and obliterating Ms. Vinther from their young and impressionable lives. The Naravanes explained how if visitation was denied Mr. Vinther planned on essentially erasing the

children's mother from their lives, something that was not vehemently disputed on his part, if it was truly disputed at all. This fact alone supports the importance of having their maternal grandparents in their lives to love and support them, but also to keep the memory of their deceased mother alive.

Although not directly at issue in the petition for visitation, the Naravanes did bring up the fact that they had concerns about the children's father's past. (CP at 14, 15, 16, 17, 184). This was brought up to explain to the trial court how the children's relationship had become even closer with their grandparents in the time following their mother's death and how important it was for them to maintain a relationship with their grandparents moving forward. (CP at 11, 16-17, 86).

Since the children were left with them at the time of Ms. Vinther's death, and based upon knowing her and her wishes, the Naravanes asserted that Ms. Vinther would have never denied them contact with her children as her husband has done since her death. (CP at 16-17). This is essentially another loss for the children of additional family members for absolutely no reason that is supported by any evidence in either the third-party custody or the visitation cases.

If the finding of the visits being denied is upheld by this Court, then all four of the children will continue to be wholly cut off from their maternal heritage. Once again, since there are no findings upon which to specifically appeal, it is difficult to use case law to attempt to argue that this requirement has been met.

d. This Court Must Reverse the Trial Court's Decision to Deny the Naravanes' Petition Without Making any Findings or Creating a Record for Appeal.

Unless final orders are agreed to by the parties the court record Will include not just written pleadings of the parties on review, but also written findings of the court and a report of the proceedings that took place. Even if the court does not make an oral ruling it is necessary to have written findings.

The trial court is required to make findings in order to enter divorce orders under RCW 26.09.030 related to the best interests of the child and entering a parenting plan. The trial court is also required to make findings under RCW 26.10 related to the best interests of the child and custody if granted.

When written findings are not available or are not entered in accordance with the applicable statutes, it detracts from the record necessary for review by this Honorable Court. As the current relative visitation statutes are worded, they require the

court to make findings of whether or not the petitioners have met their burden of proof.

However, here the only findings that were made included a checkmark under section 4 which stated “Petitioner has not shown that it is more likely than not that a petition for visits will be granted. The petition for visits should be dismissed.” (CP at 191). Under section 5 for “Other Findings” it is left blank. (CP at 191). This lack of an oral record in addition to essentially no findings being made leaves the Naravanes in a precarious position when seeking review here. Since no findings were made, the focus of this appeal cannot be narrowed to whatever issue or issues the lower court had regarding visitation.

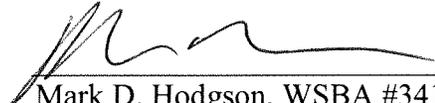
The actions of the lower court are seriously concerning and leave the Naravanes saddled with attempting to appeal issues without knowing what the court in fact focused on or believed failed to meet the required burden. The court should, at a minimum, require that this case be remained to the lower court for entry of findings in accordance with the law. Although, it is clear based on the record and the arguments presented that the Naravanes have met the required burden of proof for visitation.

F. CONCLUSION

This case is ripe for review by the appellate court. Especially considering that its facts are very similar to the historic *Troxel v. Granville* case, and bearing in mind that this is one of the first appeals of the newly enacted relative visitation statutes. The Appellate Court has the ability to inform the trial court that findings must be made at the court review, and all who petition under these applicable statutes have a right to know why the court is making that particular decision.

This Honorable Court must require that the trial court make specific factual findings when granting or denying a petition for relative visitation, whether through a written or oral record. Doing so preserves the record for appeal and makes clear to all parties why the trial court is ruling the way that it is. Furthermore, this Honorable Court must reverse the decision of the trial court in determining that a denial of the petition for relative visitation was appropriate, and since the Naravanes have met their statutory burden, the trial court must allow this case to proceed to a hearing on the petition.

Respectfully submitted this 19th day of August, 2019.



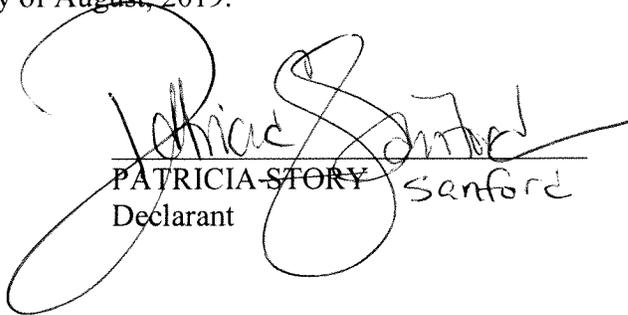
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AFFIDAVIT OF SERVICE

I, PATRICIA STORY, upon penalty of perjury under the laws of the State of Washington, declare that on the 19th day of August, 2019, I served by email a copy of the Appellant's Opening Brief to the following person at the address below:

Ms. Kerry Summers
Attorney for Respondent
KerryS@NWJustice.Org

DATED this 19th day of August, 2019.


~~PATRICIA STORY~~ Sanford
Declarant

APPENDIX

**NEW JERSEY CASE ATTACHED
IN ACCORDANCE WITH RAP 10.4(c)**

177 N.J. 84 (N.J. 2003), *Moriarty v. Bradt* /**/ div.c1 {text-align: center} /**/

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177 N.J. 84 (N.J. 2003)

827 A.2d 203

Patrick MORIARTY, Plaintiff-Respondent,

v.

Julia E. BRADT, Defendant,

and

Lynn Jack Bradt and Patricia Bradt, Intervenors-Appellants.

Supreme Court of New Jersey

July 14, 2003.

Argued Jan. 21, 2003.

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[Copyrighted Material Omitted]

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Francis W. Donahue, argued the cause for appellants (Donahue, Hagan, Klein & Newsome, attorneys, Short Hills; Mr. Donahue, Eric S. Solotoff, Morristown and Jennifer E. Jacobson, Atlanta, GA, on the briefs).

Robert T. Corcoran, Hackensack, argued the cause for respondent (Mr. Corcoran, attorney; Mr. Corcoran and Christopher R. Cavalli, on the briefs).

Ronald K. Chen, argued the cause for amicus curiae American Civil Liberties Union of New Jersey (Mr. Chen and J.C. Salyer, attorneys).

Walter A. Lesnevich and Rochell Babroff, a member of the District of Columbia and Maryland bars, submitted a brief on behalf of amicus curiae AARP Foundation Litigation (Lesnevich & Marzano-Lesnevich, attorneys).

OPINION

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LONG, J.

In *Troxel v. Granville*, 530 U.S. 57, 120 S.Ct. 2054, 147 L.Ed.2d 49 (2000), the United States Supreme Court struck down what it denominated as a "breathhtakingly broad" grandparent visitation statute enacted by the State of Washington. That decision has cast a cloud over the grandparent visitation statutes of the remaining forty-nine states. In this case, we are called on to assess our own Grandparent Visitation Statute (N.J.S.A. 9:2-7.1) in light of *Troxel* and in light of our prior jurisprudence on the subject. More particularly, because the grandparents in this case seek to override the father's determination regarding visitation, we are asked to test the statute against the fundamental right of fit parents to make decisions regarding the care and custody of their children. We hold 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. Finally, we hold that, in this case, the grandparents have met that burden.

Julia Bradt and Patrick Moriarty were married on April 26, 1987. The marriage resulted in the birth of two children, Brian in 1987 and Tara in 1990. Eventually the couple separated and Moriarty instituted a divorce action. At the time of the separation, Bradt was hospitalized for drug abuse and the children remained with Moriarty. In order to secure visitation time with Brian and Tara, Bradt's parents, Lynn Jack Bradt and Patricia Thornton Bradt (the grandparents), intervened in the divorce action.

A hearing was held on September 25, 1991. At that time, Bradt withdrew her application for custody and the parties reached an agreement regarding custody and visitation. On October 28, 1991, the trial court entered a *pendente lite* order memorializing the agreement. By its terms, the court granted Moriarty custody of

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the children and granted the grandparents visitation on alternate weekends from Thursday evening through Sunday evening. The court further ordered the grandparents to pick up and return the children to Moriarty's home in Linden, New Jersey. Bradt was initially denied visitation unless supervised by her parents. The trial court also appointed a mental health expert to conduct an examination of Moriarty, Bradt, and the children.

On April 15, 1993, after an eight-day trial, a dual final judgment of divorce was **[827 A.2d 206]** entered. Both Moriarty and Bradt had proven their claims of extreme cruelty and Moriarty had additionally proven that Bradt was an habitual drug user. As a result, Moriarty was granted sole custody of the children. Bradt was granted supervised visitation in the grandparents' presence, which was allowed to take place in Pennsylvania because the grandparents had agreed to submit to the jurisdiction of the Family Part on every aspect of the case; permitted one hour of telephone contact with the children on non-visitiation days; ordered to continue psychiatric therapy; required to undergo random weekly drug testing with the results forwarded to Moriarty; ordered to abstain from non-prescription drug and alcohol use; and required to attend weekly meetings of Alcoholic Anonymous and other support groups. Moreover, Bradt and the grandparents were forbidden to have the children treated medically except in an emergency situation.

Both parties remarried in 1994. In August 1994, Bradt was granted unsupervised visitation, which took place in New Jersey. The grandparents saw the children during most weekends that Bradt had visitation. However, significant animosity developed between Moriarty and the grandparents. Moriarty claimed that he feared for his children's safety when they visited their grandparents alone. On one occasion while with the grandparents in the Poconos, Brian pulled a cup of hot chocolate down on himself, resulting in second- and third-degree burns to his face, neck, and chest. The grandparents took Brian to the local hospital for treatment and had a neighbor who was a pediatrician, Dr. Chen,

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make sure that he had been treated properly. After learning of the incident, when the grandparents returned the children Moriarty approached them in an aggressive manner. As a result, the grandmother obtained a final restraining order against Moriarty.

On another occasion, Brian broke his leg while in the grandparents' care. In addition, Moriarty

testified that the children were bruised and cut when they were returned from visitation, as well as sick and dirty. Moriarty also testified that the grandparents and Bradt took Brian for steroid treatments for stress-induced asthma for months without informing him. However, the grandparents' long-time friend testified that they had a warm, close relationship with the children and their son James testified that they exhibited good parenting skills.

Bradt died on November 8, 1999, apparently from an overdose of prescription pain medication and cold medicine. On hearing about Bradt's death, Moriarty testified that he contacted his family priest and a bereavement counselor to determine how to handle the situation in a way that would be in the children's best interests. According to Moriarty's testimony, the bereavement counselor advised that the children should attend Bradt's wake and that a bereavement ceremony at the children's church for their mother after her funeral was appropriate; however, the counselor advised that it would not be in the children's best interests to attend their mother's funeral. Moriarty relayed that information to the grandparents. In response, they moved on an emergency basis before the trial court to permit the children to attend their mother's funeral. The court granted the motion and ordered "regular and continual visitation with the grandparents."

On December 3, 1999, the grandparents filed an emergency application for holiday visitation with the children because Moriarty had refused their request. On December 16, 1999, the trial court held a hearing on the issue, resulting in a consent **[827 A.2d 207]** order granting holiday visitation with the children from December 26 to December 28, 1999, and thereafter, once every five weeks, consisting of two consecutive overnight visits until a plenary hearing on

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the merits could be held. Among other things, the court ordered diagnostic evaluations of Moriarty, the grandparents, the children, and Bradt's husband.

On January 26, 2000, a court-ordered probation investigation report was filed with the court, which noted that Moriarty insisted on supervised visitation because he believed that the grandparents were responsible for their daughter's psychiatric problems. Moriarty further told the evaluators that he feared that the grandparents could have a negative influence on the children.

Family Services completed the court-ordered diagnostic evaluations and the team filed its report. In that evaluation, the Family Services team noted that the grandmother had obtained a bachelor's degree in zoology, as well as a master's degree and a doctorate in biology. For approximately eighteen years, the grandmother was a professor and research scientist at Lehigh University. Since 1993, she had been employed at Muhlenberg College as a professor of environmental science. The grandfather graduated with a dual degree in mechanical and industrial engineering and had taken other courses, including business courses at Harvard. He founded a business that manufactured a type of conveyor belt based on technology that he had patented. He served as that company's chief executive officer for thirty years. In addition, the grandfather had worked as a business consultant and a teacher.

Moriarty's background is similarly impressive. He obtained a bachelor's degree in business and economics, as well as a master's degree in economics. He joined the Air Force and attended Flight School. He subsequently served several years in the Air Force Reserve. At the time of the report, Moriarty was employed as an executive vice-president and partner running a hedge fund.

He and his wife have five children: two children from her previous marriage, his two children, and one child in common.

Based on its interviews, the team determined that the grandparents could "serve as a conduit with the children's deceased mother and can be a positive resource for the children in many ways."

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Accordingly, the report recommended unsupervised grandparent visitation once per month for two full days in New Jersey, while the grandparents stayed overnight in a hotel and the children slept at home. Moreover, the report recommended that the grandparents attend the children's weekend activities; have regular telephone and email contact with them; have holiday visitation, so long as it did not interfere with the children's activities; and if no contraindications, visitation should progress to taking place once monthly at the grandparents' home, subject to the children's scheduled activities.

In June 2000, Moriarty filed a motion for summary judgment on the issue of grandparent visitation in light of the United States Supreme Court's ruling in *Troxel v. Granville*, 530 U.S. 57, 120 S.Ct. 2054, 147 L.Ed.2d 49 (2000), that had invalidated the State of Washington's grandparent visitation statute on constitutional grounds because it infringed on fit parents' constitutional rights to rear their children. Moriarty then offered the following visitation schedule that he believed to be in the best interests of the children: the grandparents were allowed to visit one day each month during an activity or activities of either or both of the children, on either Saturday or Sunday, and for two hours **[827 A.2d 208]** after such activity for lunch or dinner. That schedule further provided that all visitation would occur in Bergen County and that the children would not be permitted to leave Bergen County at any time during the visitation. Moriarty agreed that by the fifth of each month, he would furnish the grandparents with the date, time, and place of the activity or activities that they would be invited to attend. In his certification in support of the motion, Moriarty reiterated that he was "not attempting to eliminate contact between [his] children and their maternal grandparents"; rather, he was seeking to establish a visitation schedule that he believed was in his children's best interests.

On June 28, 2000, the trial court adjourned Moriarty's summary judgment motion and granted additional summer visitation to the grandparents for five consecutive days in July 2000. Moriarty

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applied for a stay of that summer visitation order, which was denied. On August 7, 2000, the trial court heard additional oral argument on Moriarty's motion for summary judgment. Moriarty argued that *Troxel* factually was similar to his case and thus, the trial court was required to defer to his decision, as a fit parent, regarding grandparent visitation. The grandparents responded that Moriarty's visitation proposal was effectively no visitation. In addition, although the grandparents conceded that a fit parent's decision regarding visitation is entitled to some deference, they argued that the New Jersey statute mandates a hearing to determine whether the proposed visitation is in the best interest of the children.

In denying the motion, the trial court noted the "extremely heavy burden" that the grandparents would have to carry under the ruling in *Troxel*. The trial court ordered a plenary

hearing to afford the grandparents the opportunity to present expert testimony and their witnesses. At the hearing, the court noted that the grandparents had modified their request to once a month visitation, alternating between two overnights and daytime visits of five to six hours. Furthermore, the grandparents sought two weeks of extended visitation over the summer--one week in July and one in August.

The hearing concluded on October 20, 2000, with the trial court reserving its decision. During the hearing, however, the court entered an order granting the grandparents overnight visitation with the children at their home in Easton, Pennsylvania for two nights on the weekend of October 6, 2000. On November 9, 2000, after detailed factual findings, the trial court rendered its decision and ordered grandparent visitation as follows: (1) monthly visitation alternating between a five-hour day visit one month and a visit with two overnights the next month and (2) one extended visitation period in July or August. The court specifically noted that the reason it ordered that visitation was its reliance on the grandparents' expert who opined that such visitation was "to
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protect the children from the harm that would befall them if they were alienated from their grandparents."

Moriarty appealed the trial court's order, primarily on the basis that New Jersey's statute is unconstitutional as applied in this case and accordingly, that the trial court abused its discretion in not abiding by the schedule that he had proposed. While that appeal was pending, Moriarty continued to make additional demands on the grandparents' visitation schedule ordered by the court. Those conditions included: taking the children to Roman Catholic mass; refraining from drinking any alcohol in the children's presence; not leaving the children alone, separating them, or placing them with strangers; not **[827 A.2d 209]** leaving them alone with their Uncle George, "an admitted homosexual"; and if the children became ill or injured, returning them home immediately. The trial court granted the additional condition regarding emergency illnesses or injuries. With respect to church attendance, the grandparents obviated the need for a court ruling by agreeing to take the children to mass. The other conditions that Moriarty sought unilaterally to impose on the grandparents' visitation time with the children were denied.

In an unpublished opinion, the Appellate Division reversed the trial court and remanded for implementation of visitation as requested by Moriarty. The panel stressed that, "[w]e find no fault with the judge's factual findings [.]" Slip op. at 20. However, it noted that Moriarty's "substantive due process rights were violated by the imposition of the visitation ordered," in light of his alternative proffer. Slip op. at 19. In view of *Troxel*, the panel held that the decision of a fit parent to curtail grandparental visitation "cannot, under these facts, be subject to attack." Slip op. at 20. "[I]nterference with plaintiff's parental decision to afford the limited visitation offered was constitutionally impermissible." Slip op. at 21.

We granted the grandparents' petition for certification, 174 N.J. 189, 803A.2d 1161 (2002). We also granted *amici* status to the

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State of Jersey, the AARP, and the American Civil Liberties Union (ACLU). We now reverse.

The grandparents argue that the Grandparent Visitation Statute is constitutional; that a fit parent's decisions are entitled to deference, but are not absolute; and that the decision of the Appellate Division "eviscerates the grandparent visitation statute and thirty years of jurisprudence" supporting the rights of grandparents. The Attorney General and the AARP support those contentions.

Moriarty counters that the Appellate Division's decision is in accordance with *Troxel* and our prior case law and that the statute as applied is unconstitutional. The ACLU supports Moriarty and argues that the statute, as applied, violates due process by unconstitutionally infringing on the right of a fit parent to make decisions regarding his or her child's care and upbringing. More particularly, the ACLU urges us to hold that such parental decisions can be overridden only by clear and convincing evidence of demonstrable harm.

III

At common law, grandparents had no legal right to petition for visitation with their grandchildren. Kristine L. Roberts, *State Supreme Court Applications of Troxel v. Granville and the Courts' Reluctance to Declare Grandparent Visitation Statutes Unconstitutional*, 41 *Fam. Ct. Rev.* 14, 15 (2003) (footnotes omitted); Ann M. Stanton, *Grandparents' Visitation Rights and Custody*, 7 *Child & Adolescent Psychiatric Clinics of N. Am.* 409, 411 (1998); Scott C. Boen, Note, *Grandparent Visitation Statutes: The Constitutionality of Court Ordered Grandparent Visitation Absent a Showing of Harm to the Child*, 20 *J. Juv. L.* 23, 28 (1999) (footnote omitted). In *Mimkon v. Ford*, we summarized five basic reasons for the historical denial of grandparent visitation:

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.

[827 A.2d 210]

(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 which follow judicial intervention.

[66 N.J. 426, 431, 332 A.2d 199 (1975) (quoting Duncan Gault, *Statutory Grandparent Visitation*, 5 *St. Mary's L.J.* 474, 480-81 (1973) (internal citations omitted)).]

That reasoning flowed from the social science research of the day. In fact, historically, there was practically no research regarding grandparents because most studies that related to family life were guided by emphasis on the "isolated nuclear family." Chrystal C. Ramirez Barranti, *The Grandparent/Grandchild Relationship: Family Resource in an Era of Voluntary Bonds*, 34 *Fam.*

Rel. 343, 344 (1985). Even positing a role for grandparents was viewed as "antithetical to the norms of self-reliance and independence which were attributed to the nuclear family." *Ibid.* (citations omitted). Originally, those attitudes reflected the fact that longevity rates did not allow most grandparents to play a long-term role in their grandchildren's lives. *Id.* at 343.

Things began to change as grandparents lived longer and had more opportunity to forge a sustained and lengthy relationship with their grandchildren. *Ibid.* The rise in family breakups also played a part in reinvigorating the grandparents' role. *Id.* at 346; see Thomas E. Denham & Craig W. Smith, *The Influence of Grandparents on Grandchildren: A Review of the Literature and Resources*, 38 *Fam. Rel.* 345, 345 (1989) (noting that increased longevity rates and demographic changes, such as family disruption through divorce, alcoholism, and/or other social problems, "have opened the door to a new and growing emphasis on grandparenthood"). Against that setting, new explorations of the grandparents' role in American society were begun in the late
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1950s through the 1970s. Ramirez Barranti, *supra*, 34 *Fam. Rel.* at 344. Additional initiatives were aimed at developing "typologies" of grandparenthood. *Ibid.*; see also Denham & Smith, *supra*, 38 *Fam. Rel.* at 347 (noting that typologies assist in characterizing "types of behavior" and "style of interaction" that take place). Many such typologies emerged, including but not limited to historian, mentor, role model, and nurturer. Ramirez Barranti, *supra*, 34 *Fam. Rel.* at 345 (citing Arthur Kornhaber, M.D. & Kenneth L. Woodward, *Grandparents/Grandchildren: The Vital Connection* (1981)).

Moreover, the importance of the grandparent-grandchild relationship in the lives of children has been confirmed. See *id.* at 346-47 (describing studies by Baranowski, Kornhaber and Woodward, and Mead in support of that contention).

The emotional attachments between grandparents and grandchildren have been described as unique in that the relationship is exempt from the psycho-emotional intensity and responsibility that exists in parent/child relationships. The love, nurturance, and acceptance which grandchildren have found in the grandparent/grandchild relationship "confers a natural form of social immunity on children that they cannot get from any other person or institution."

[*Id.* at 346 (citing Kornhaber & Woodward, *supra*, at xiii-xiv).]

[827 A.2d 211] Commentators have suggested that, "[i]n the absence of a grandparent/grandchild relationship, children experience a deprivation of nurturance, support, and emotional security." *Id.* at 346-47 (describing studies by Kornhaber and Woodward and Mead). Indeed, Kornhaber and Woodward posited that " 'the complete emotional well-being of children requires that they have a direct, and not merely derived, link with their grandparents.' " *Id.* at 347 (quoting Kornhaber & Woodward, *supra*, at 163). Mead advanced the notion that "when an individual does not have intergenerational family relationships there is a resulting lack of cultural and historical sense of self." *Ibid.*

To be sure, those broad conclusions would not necessarily apply to a grandparent with an emotional disorder or serious character or behavioral flaws or to one who placed the child in danger or sought to subvert the relationship of the child to his parents. See, e.g., *King v. King*, 828

S.W.2d 630, 632(Ky.) (noting that children "ordinarily benefit" from contact with grandparents
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that are "physically, mentally, and morally fit"), *cert. denied*, 506 U.S. 941, 113 S.Ct. 378, 121 L.Ed.2d 289 (1992); Stanton, *supra*, 7*Child & Adolescent Psychiatric Clinics of N. Am.* at 410 (noting that grandparents who interfere with childrearing and parental discipline can negatively affect family relationships). Grandparents, like every other group of humans in society, are not monolithic. They range across the spectrum from wholesome nurturers to bad influences. See Karen Czapanskiy, *Grandparents, Parents and Grandchildren: Actualizing Interdependency in Law*, 26 *Conn. L.Rev.* 1315, 1324-31 (1994) (noting that psycho-social research indicates that not all grandparent/grandchild relationships are beneficial to grandchildren; rather, many grandparent/grandchild relationships merely provide grandchildren with ephemeral benefits). Thus, although as a general proposition the grandparents' role in a child's life may be very important, each case in which grandparents are pitted against parents over visitation with grandchildren must stand or fall on its own facts. See *Troxel, supra*, 530 U.S. at 73, 120 S.Ct. at 2064, 147 L.Ed.2d at 61 (observing that "much state-court adjudication" regarding grandparent visitation "occurs on a case-by-case basis"). That is the backdrop on which our Grandparent Visitation Statute was enacted.

IV

In 1972, New Jersey, replicating what would eventually take place in all fifty states, [1] enacted the Grandparent Visitation Statute. N.J.S.A. 9:2-7.1 (L. 1971, c. 420, § 1, effective Feb. 1, 1972). That statute, as amended in 1973, afforded standing to grandparents to seek visitation when "either or both of the parents of a

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minor child ... is or are deceased, or divorced or living separate and apart in different habitats...." N.J.S.A. 9:2-7.1 (as amended by L. 1973, c. 100, § 1). The statute was amended in 1987 to allow siblings to apply for visitation with the child. N.J.S.A. 9:2-7.1 (as amended by L. 1987, c. 363, § 2). Thus, prior to 1993, "intact families" (those not disrupted by death or divorce) were not subject to statutory visitation rights of grandparents.

[827 A.2d 212] In 1993, N.J.S.A. 9:2-7.1, was amended to provide:

a. A grandparent or any sibling of a child residing in this State may make application before the Superior Court, in accordance with the Rules of Court, for an order for visitation. It shall be the burden of the applicant to prove by a preponderance of the evidence that the granting of visitation is in the best interests of the child.

b. In making a determination on an application filed pursuant to this section, the court shall consider the following factors:

(1) The relationship between the child and the applicant;

(2) The relationship between each of the child's parents or the person with whom the child is

residing and the applicant;

(3) The time which has elapsed since the child last had contact with the applicant;

(4) The effect that such visitation will have on the relationship between the child and the child's parents or the person with whom the child is residing;

(5) If the parents are divorced or separated, the time sharing arrangement which exists between the parents with regard to the child;

(6) The good faith of the applicant in filing the application;

(7) Any history of physical, emotional or sexual abuse or neglect by the applicant; 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. 9:2-7.1 (as amended by L. 1993, c. 161, § 1 (effective June 29, 1993)).]

The effect of the new statute was to expand the scope of grandparents' visitation rights and to remove the requirement that the parents be deceased or divorced. The Act became effective June 29, 1993.

We detailed the legislative history of the latest version of the Act in *In re Adoption of a Child by W.P. & M.P.*:

On May 20, 1993, the General Assembly gave final approval to the Grandparent Visitation Statute. The bill was signed into law by Governor Florio on June 29,

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1993, and became effective that same day. As previously stated, the new law eliminated the requirement that a child's parents be deceased, divorced or separated in order for a grandparent to apply for visitation rights. Instead, the statute provides that "a grandparent or any sibling of a child residing in this State" may apply for visitation, and it instructs the Superior Court to consider eight enumerated factors when determining whether the grant of such visitation is in the best interests of the child.

In its original form, the bill did not enumerate factors, requiring only that visitation be in the best interests of the child, with no guidance to the courts. In an apparent response to concerns that it constituted "a gross invasion of the sanctity and privacy of the family unit," the bill was amended, setting forth the eight factors as a way of limiting the intrusive elements of the act. See Letter from Cary B. Cheifetz, Esq., Skoloff & Wolfe, to Gov. Jim Florio (Dec. 22, 1992) (enclosing proposed bill setting forth specific criteria that protect child's best interests).

A precursor to the current statute Assembly Bill No. 1475 was prefiled for introduction in the 1990 session. That

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version expressly required that the court consider the objections of a parent to an application for visitation by that parent's parent (i.e., the child's grandparent). See Assembly Bill No. 1475, Prefiled for Introduction in the 1990 Session. According to the bill statement accompanying Bill No. 1475, the purpose of that provision was to "ensure that the court does not grant visitation to a parent's own blood relatives without considering whether the parent may object to such visitation." *Id.* at 2 (emphasis [omitted]). Although that provision was not enacted in the final bill, it suggests that the Legislature believed that parental autonomy should be afforded deference. [163 N.J. 158, 165-66, 748 A.2d 515 (2000).]

In essence, our statute has undergone transformation over the years, and grants standing to grandparents and siblings to seek visitation with a child. Its structure underscores the fact-sensitive nature of the inquiry by detailing seven particularized considerations for the court and instructing the court to consider as well, "any other factor" relevant to the child's best interests.

The Grandparent Visitation Statute, like all others, is presumed to be constitutional--"a presumption that may be rebutted only on a showing that a provision of the Constitution is clearly violated by the statute." *In re Adoption of a Child by W.P.*, *supra*, 163 N.J. at 192, 748 A.2d 515 (Poritz, C.J., dissenting) (citing *Board of Educ. v. Caffiero*, 86 N.J. 308, 318, 431A.2d 799, *appeal dismissed*, 454 U.S. 1025, 102 S.Ct. 560, 70 L.Ed.2d 470 (1981)).

V

The right to rear one's children is so deeply embedded in our history and culture that it has been identified as a fundamental liberty interest protected by the Due Process Clause of the Fourteenth Amendment to the United States Constitution. See *Wisconsin v. Yoder*, 406 U.S. 205, 232-33, 92 S.Ct. 1526, 1541-42, 32 L.Ed.2d 15, 35 (1972) (explaining "primary role" of parents in raising their children as "an enduring American tradition" and the Court's historical recognition of that right as fundamental). Although often expressed as a liberty interest, childrearing autonomy is rooted in the right to privacy. See *Prince v. Massachusetts*, 321 U.S. 158, 166, 64 S.Ct. 438, 442, 88 L.Ed. 645, 652 (1944) (observing existence of "private realm of family life which the state cannot enter"); *V.C. v. M.J.B.*, 163 N.J. 200, 218, 748 A.2d 539 (remarking that "the right of a legal parent to the care and custody of his or her child derives from the notion of privacy"), *cert. denied*, 531 U.S. 926, 121 S.Ct. 302, 148 L. Ed.2d 243 (2000). Eighty years ago in *Meyer v. Nebraska*, the United States Supreme Court characterized the right of parents to bring up their children "as essential to the orderly pursuit of happiness by free men." 262 U.S. 390, 399, 43 S.Ct. 625, 626, 67 L.Ed. 1042, 1045 (1923) (citations omitted).

In *Prince*, the Court elaborated on that right, declaring that "[i]t is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder." 321 U.S. at 166, 64 S.Ct. at 442, 88 L.Ed. at 652 (citation omitted). The Court further stated, "[I]t is in recognition of this [right] that [*Pierce v. Society of Sisters*, 268 U.S. 510, 45 S.Ct. 571, 69 L.Ed. 1070 (1925) and *Meyer, supra*, 262 U.S. 390, 43 S.Ct. 625, 67 L.Ed. 1042,] have respected the private realm of family life which the state cannot enter." *Prince, supra*, 321 U.S. at 166, 64 S.Ct. at 442, 88 L.Ed. at 652. In *Yoder*,

[827 A.2d 214] the Court recognized that a child is not a " 'mere creature of the State; those who nurture him and direct his destiny have the

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right, coupled with the high duty, to recognize and prepare him for additional obligations.' " 406 U.S. at 233, 92 S.Ct. at 1542, 32 L.Ed.2d at 35 (quoting *Pierce, supra*, 268 U.S. at 534-35, 45 S.Ct. at 573, 69 L.Ed. at 1078). The Court observed that the "primary role of the parents in the upbringing of their children is now established beyond debate as an enduring American tradition." *Yoder, supra*, 406 U.S. at 232, 92 S.Ct. at 1541-42, 32 L. Ed.2d at 35; see also *Stanley v. Illinois*, 405 U.S. 645, 651, 92 S.Ct. 1208, 1212, 31 L.Ed.2d 551, 558 (1972) (noting constitutional protection of parent's interest in "companionship, care, custody, and management of his or her children"); *Pierce, supra*, 268 U.S. at 534-35, 45 S.Ct. at 573, 69 L.Ed. at 1078 (noting parents' and guardians' liberty interest "to direct the upbringing and education of children under their control"). We have recognized unfailingly that deeply embedded right in our jurisprudence as well. *Watkins v. Nelson*, 163 N.J. 235, 245, 748 A.2d 558 (2000); *V.C., supra*, 163 N.J. at 217-18, 748 A.2d 539; *In re Guardianship of K.H.O.*, 161 N.J. 337, 346, 736 A.2d 1246 (1999).

To be sure, the constitutional imperative of preserving familial integrity is not absolute. *Yoder, supra*, 406 U.S. at 233-34, 92 S.Ct. at 1542, 32L.Ed.2d at 35; *Prince, supra*, 321 U.S. at 166, 64 S.Ct. at 442, 88 L.Ed. at 652; *V.C., supra*, 163 N.J. at 218, 748 A.2d 539. Situations have arisen requiring a state to exercise its *parens patriae* authority to guard children from harm. See *Prince, supra*, 321 U.S. at 166-67, 64 S.Ct. at 442, 88 L.Ed. at 652 (recognizing when circumstances place child in imminent danger, or affect his well-being, state could properly intrude on that "private realm of family life" to protect child from harm). Thus, for example, our courts have overridden the desires of parents who refused to consent to medical treatment and ordered such treatment to save a child's life. See *Parham v. J.R.*, 442U.S. 584, 603, 99 S.Ct. 2493, 2504, 61 L.Ed.2d 101, 119 (1979) ("Nonetheless, we have recognized that a state is not without constitutional control over parental discretion in dealing with children when their physical or mental health is jeopardized." (citations omitted)); *Prince, supra*, 321 U.S. at 166-67, 64 S.Ct. at 442, 88 L.Ed. at 652-53 (noting that state, *asparens patriae*, can intrude on parental autonomy to protect child from ill health or death); *Jehovah's Witnesses v. King County Hosp. Unit No. 1*, 278F.Supp. 488, 498-99, 504-05 (W.D.Wash.1967) (holding Washington State statute that declared children to be dependents of state for purpose of authorizing blood transfusions against expressed wishes of parents was constitutional), *aff'd*, 390 U.S. 598, 88 S.Ct. 1260, 20 L.Ed.2d 158 (1968) (per curiam); *State v. Perricone*, 37 N.J. 463, 474, 181 A.2d 751 (finding state may act under its *parens patriae* authority to protect child's welfare by declaring him or her neglected to obtain necessary medical treatment), *cert. denied*, 371U.S. 890, 83 S.Ct. 189, 9 L.Ed.2d 124 (1962); *Muhlenberg Hosp. v. Patterson*, 128 N.J.Super. 498, 503, 320 A.2d 518 (Law Div.1974) (ordering blood transfusion to infant over parents' wishes).

Summing up, when the State seeks, by statute, to interfere with family and parental autonomy, a fundamental right is at issue. That statute thus is subject to strict scrutiny and will only pass muster if it is narrowly tailored to serve a compelling state interest. *Washington v. Glucksberg*, 521 U.S. 702, 720-21, 117 S.Ct. 2258, 2268, 138 L.Ed.2d 772, 787-88 (1997); *Roe v.*

Wade, 410 U.S. 113, 155-56, 93 S.Ct. 705, 728, 35 L.Ed.2d 147, 178 (1973) (citations [827 A.2d 215] omitted); *Brown v. City of Newark*, 113 N.J. 565, 573, 552 A.2d 125 (1989) (citations omitted); see also *Roth v. Weston*, 259 Conn. 202, 789 A.2d 431, 441-42 (2002) (noting that strict scrutiny is required where fundamental right of parents to care, custody, and control of their children is implicated and that statutory scheme infringing on same must be narrowly tailored "so that a person's personal affairs are not needlessly intruded upon and interrupted by the trauma of litigation" (citation omitted)); *Lulay v. Lulay*, 193 Ill.2d 455, 250 Ill.Dec. 758, 739 N.E.2d 521, 532 (2000) (holding that because Illinois grandparent visitation statute infringes on fundamental right of parents to upbringing of their children, state must prove that statute serves compelling state interest and is narrowly tailored to serve that compelling interest); *Rideout v. Riendeau*,

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761 A.2d 291, 299-300 (Me.2000) (explaining that "heightened protection against state intervention in parents' fundamental right to make decisions concerning the care, custody, and control of their children" requires "strict scrutiny of the statute at issue" (citations omitted)); *Blixt v. Blixt*, 437 Mass. 649, 774 N.E.2d 1052, 1059 (2002) (observing that strict scrutiny requires compelling state interest to justify state action and "careful examination to ascertain whether the action taken was 'narrowly tailored to further [that] interest' " (quotation omitted)), cert. denied, 537 U.S. 1189, 123 S.Ct. 1259, 154 L.Ed.2d 1022 (2003); *Hoff v. Berg*, 595 N.W.2d 285, 290-91 (N.D.1999) (applying strict scrutiny and noting that " 'the idea of strict scrutiny acknowledges that [] political choices ... burdening fundamental rights ... must be subjected to close analysis in order to preserve substantive values of equality and liberty.' " (quoting Laurence H. Tribe, *American Constitutional Law* § 16-6 at 1451 (2d ed.1988))).

VI

On that backdrop, we turn to the United States Supreme Court's recent decision in *Troxel*. There, the Court addressed the constitutionality of the Washington State nonparental visitation statute, *Wash. Rev.Code* § 26.10.160(3) (1994), that provided: " 'Any person may petition the court for visitation rights at any time including, but not limited to, custody proceedings. The court may order visitation rights for any person when visitation may serve the best interest of the child whether or not there has been any change of circumstances.' " *Troxel, supra*, 530 U.S. at 61, 120 S.Ct. at 2057-58, 147 L.Ed.2d at 54. The grandparents in *Troxel*, whose son had committed suicide, initially sought two weekends of overnight visitation per month, as well as two weeks of visitation each summer with their grandchildren with whom they had a long-standing pre-existing relationship. *Id.* at 60-61, 120 S.Ct. at 2058, 147 L.Ed.2d at 53-54. The mother did not oppose visitation; rather, she sought to limit that visitation to one day per month

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without an overnight stay. *Id.* at 61, 120 S.Ct. at 2058, 147 L.Ed.2d at 54.

After a trial, the trial court ruled in favor of the grandparents because " 'it is normally in the best interest of the children to spend quality time with the grandparent.' " *Id.* at 69, 120 S.Ct. at 2062, 147 L.Ed.2d at 59 (quotation omitted). The court ordered visitation one weekend per month, one week during the summer, and four hours on each of the grandparents' birthdays. *Id.* at 61, 120 S.Ct. at 2058, 147 L.Ed.2d at 54 (citations omitted). It stated:

The [grandparents] are part of a large, central, loving family, all located in this area, and the [grandparents] can provide opportunities for the children in the areas of cousins and music.... The children would be benefitted from spending

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quality time with the [grandparents], provided that that time is balanced with time with the children['s] nuclear family.

[*Id.* at 61-62, 120 S.Ct. at 2058, 147 L.Ed.2d at 54 (quotation omitted).]

The Washington Court of Appeals reversed and dismissed the grandparents' petition on the basis that "nonparents lack standing to seek visitation under § 26.10.160(3) unless a custody action is pending." *Id.* at 62, 120 S.Ct. at 2058, 147 L.Ed.2d at 54. The grandparents appealed, and the Washington Supreme Court affirmed. *Id.* at 62-63, 120 S.Ct. at 2058, 147 L.Ed.2d at 55. The court found that the grandparents had standing based on the unambiguous language of § 26.10.160(3) but affirmed the appellate court's ultimate ruling that the grandparents were not entitled to visitation under the statute because the statute impermissibly interfered with the fundamental right of parents to rear their children. *Id.* at 62-63, 120 S.Ct. at 2058, 147L.Ed.2d at 55. Clearly underpinning the court's decision was its conviction that the best interest standard articulated in the statute was insufficient to serve as a compelling state interest. *See id.* at 63, 120 S.Ct. at 2058, 147L.Ed.2d at 55 (noting that Washington Supreme Court observed that state only has compelling interest warranting interference with parental autonomy to protect child from harm or potential harm).

The United States Supreme Court, in a plurality opinion authored by Justice O'Connor, reaffirmed that the parental right to

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raise children is guaranteed by the Due Process Clause of the Fourteenth Amendment and held that the Washington statute impermissibly intruded on the mother's rights. *Id.* at 65-67, 120 S.Ct. at 2059-61, 147 L.Ed.2d at 56-58. First, the Court focused on the "breathhtakingly broad" nature of the Washington statute because it permitted any person, at any time, to petition a court for visitation and permitted a court to decide that visitation was in a child's best interest. *Id.* at 67, 120 S.Ct. at 2061, 147 L.Ed.2d at 57. Second, the Court observed that the statute failed to accord any special weight to a parent's decision regarding visitation. *Id.* at 67, 120 S.Ct. at 2061, 147 L.Ed.2d at 57. "Thus, in practical effect, ... a court can disregard and overturn *any* decision by a fit custodial parent concerning visitation whenever a third party affected by the decision files a visitation petition, based solely on the judge's determination of the child's best interests." *Id.* at 67, 120 S.Ct. at 2061, 147 L.Ed.2d at 57-58 (emphasis in original).

Third, the Court noted that no party had alleged that the mother was an unfit parent. *Id.* at 68, 120 S.Ct. at 2061, 147 L.Ed.2d at 58. As such, the presumption that a fit parent acts in the best interests of his or her child was turned on its head by effectively assuming a presumption in favor of visitation and placing the burden of disproving visitation on the mother, a fit parent. *Id.* at 69, 120 S.Ct. at 2062, 147 L.Ed.2d at 58.

Finally, the Court noted that there was no allegation that the mother sought to discontinue

visitation between the grandparents and her children; rather, she sought to limit that visitation to an amount that she believed was in her daughters' best interest. *Id.* at 71, 120 S.Ct. at 2062-63, 147 L.Ed.2d at 60. Given that combination of factors, in conjunction with the Washington trial court's "slender findings," the Court held that § 26.10.160(3) as applied to the mother was unconstitutional. *Id.* at 72, 120 S.Ct. at 2063-64, 147 L.Ed.2d at 60-61.

The Court avoided the basic issue of the appropriate level of scrutiny and the standard to be applied. It also stopped short of invalidating nonparental visitation statutes

[827 A.2d 217] *per se* and declined to

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define "the precise scope of the parental due process right in the visitation context" because "the constitutionality of any standard for awarding visitation turns on the specific manner in which that standard is applied" as "much state-court adjudication in this context occurs on a case-by-case basis." *Id.* at 73-74, 120 S.Ct. at 2064, 147 L.Ed.2d at 61-62 (citations omitted). Consequently, the Court did not rule on whether a showing of harm or potential harm to a child is required as a condition precedent to ordering visitation. *Id.* at 73, 120 S.Ct. at 2064, 147 L.Ed.2d at 61.

Justice Souter concurred in the judgment but would have affirmed the decision of the Washington Supreme Court, which invalidated § 26.10.160(3) on its face because of the overbroad statutory language. *Id.* at 75-77, 120 S.Ct. at 2065-66, 147 L.Ed.2d at 62-64 (Souter, J., concurring in judgment). Justice Thomas authored a brief opinion concurring in the judgment, wherein he noted that the Court failed to articulate the "appropriate standard of review." *Id.* at 80, 120 S.Ct. at 2068, 147 L.Ed.2d at 65 (Thomas, J., concurring in judgment). Justice Thomas would have applied strict scrutiny because a fundamental right was implicated and would have invalidated the statute because of its inability to pass that level of scrutiny. *Id.* at 80, 120 S.Ct. at 2068, 147 L.Ed.2d at 65 (Thomas, J., concurring in judgment). [2]

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The Supreme Court of Arkansas recently reduced the holding in *Troxel* to its basic elements. *Linder v. Linder*, 348 Ark. 322, 72 S.W.3d 841, 852-55 (2002). We agree with that analysis:

To summarize, six Justices agreed that the case should be affirmed (O'Connor, Rehnquist, Ginsburg, Breyer, Souter, and Thomas). Eight Justices agreed that the Fourteenth Amendment protects a parent's right to raise his or her child without undue interference from government (all but Scalia; Thomas with reservations). Five Justices agreed that a fit parent is accorded a presumption that the parent acts in the child's best interests (O'Connor, Rehnquist, Ginsburg, Breyer, and Stevens). Four Justices (O'Connor, Rehnquist, Ginsburg, and Breyer) agreed that "special factors" must "justify" the state's intrusion, and that one of those factors is a finding of parental unfitness.

[*Id.* at 855.]

In sum, although eschewing the articulation of the level of scrutiny and the standard to be applied to a grandparent visitation statute, *Troxel* instructs at least this much--that a fit parent has a fundamental due process right to the care and **[827 A.2d 218]** nurturance of his or her children; that that right is protected where a nonparental visitation statute respects a fit parent's decision

regarding visitation by (1) according him or her the "traditional presumption" that a fit parent acts in the best interests of the child; and (2) giving "special weight" to a fit parent's determination regarding visitation. *Troxel, supra*, 530 U.S. at 66, 69, 120 S.Ct. at 2060, 2062, 147 L.Ed.2d at 57-59. Other salient factors mentioned in *Troxel* include: the breadth of a statute's standing requirement, *id.* at 67, 120S.Ct. at 2061, 147 L.Ed.2d at 57; whether harm or potential harm is required before a court may order visitation, *id.* at 73, 120 S.Ct. at 2064, 147L.Ed.2d at 61; the denial of visitation in its entirety, *id.* at 71, 120S.Ct. at 2062-63, 147 L.Ed.2d at 60; and whether the statute requires more than a simple best interest analysis, *id.* at 67, 120 S.Ct. at 2061, 147L.Ed.2d at 57-58. Many state courts have decoded *Troxel*'s elliptical message in similar fashion. See, e.g., *Roth, supra*, 789 A.2d at 439 (concluding that *Troxel* plurality found that Washington statute was unconstitutional as applied because trial court

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made no finding of unfitness; trial court failed to accord any weight to mother's determination of her children's best interests; and no allegation was made that visitation was cut off completely); *Rideout, supra*, 761 A.2d at 297 (determining that *Troxel* provided some "guidance on important points," including that parents have fundamental right to care, custody, and control of their children, which does not give way to third party's petition for visitation; best interests standard, without more, is insufficient for state to interfere with parental decision making; and special weight must be given to parents' decisions because of presumption that he or she acts in child's best interest); *Blixt, supra*, 774 N.E.2d at 1058-59 (construing *Troxel* to provide following guideposts: reaffirmation of parent's liberty interest in raising his or her child is fundamental right; any person should not be granted standing to seek visitation; presumption exists that parents act in child's best interest, which warrants significant deference; and potential impact of grandparent visitation on parent-child relationship should be considered in trial court's analysis).

VII

Courts across the country have wrestled with the issue of grandparent visitation both before and after *Troxel*. In general, they have engaged in one of two modes of analysis: (1) interpreting the statutes to require satisfaction of a harm standard in order to overcome the presumption in favor of a fit parent's decision or (2) avoiding the articulation of any standard at all and analyzing the statutes on a case-by-case basis. *Troxel* implied that either approach would be acceptable. *Roberts, supra*, 41 *Fam. Ct. Rev.* at 22 (footnotes omitted).

Courts in the former category have undertaken traditional strict scrutiny review. That review routinely focuses on whether a compelling state interest warrants state intrusion into family life. Because parental autonomy is a fundamental right, the majority of those courts have rejected any compelling interest short of harm to the health or welfare of a child. As such, those courts have

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required a threshold showing of harm prior to utilizing a best interests analysis to protect parental rights. See, e.g., *Brooks v. Parkerson*, 265 Ga. 189, 454 S.E.2d 769, 773 n. 5 (Ga.) ("[T]he 'best interest of the child' standard does not come into play to permit interference with the custody and control of the child, over parental objection, unless and until there is a showing of *harm* to the child without that interference."), *cert. denied*, 516 U.S. 942, 116 S.Ct. 377, 133 L.Ed.2d 301 (1995); *In*

re *Herbst*, 971 P.2d 395, 399 (Okla.1998)

[827 A.2d 219] ("To reach the issue of a child's best interests, there must be a requisite showing of harm, or threat of harm.... Absent a showing of harm, (or threat thereof) it is not for the state to choose which associations a family must maintain and which the family is permitted to abandon."); *Hawk v. Hawk*, 855 S.W.2d 573, 580 (Tenn.1993) (requiring "an initial showing of harm ... before the state may intervene to determine the 'best interests of the child' "); *Williams v. Williams*, 256 Va. 19, 501 S.E.2d 417, 418 (1998) ("[B]efore visitation can be ordered over the objection of the child's parents, a court must find an actual harm to the child's health or welfare without such visitation. A court reaches consideration of the "best interests" standard in determining visitation only after it finds harm if visitation is not ordered." (quotations omitted)); *but see, e.g., Rideout, supra*, 761 A.2d at 300-01 (applying strict scrutiny standard of review and rejecting harm as only permissible compelling state interest but noting that that interest requires "something more than the best interest of the child" (footnote omitted)); *Michael v. Hertzler*, 900 P.2d 1144, 1147, 1151 (Wyo.1995) (conducting strict scrutiny review but finding that because right to associate with one's family is fundamental right of parents, children, and grandparents, court found that best interests balancing test was sufficient to weigh those interests).

Courts in the latter category have simply compared the structure of their statutes to the one invalidated in *Troxel* to assess constitutionality. *See, e.g., Jackson v. Tangreen*, 199 Ariz. 306, 18 P.3d 100 (Ct.App.2000) (determining that *Troxel* had no bearing on Arizona's grandparent visitation statute because that statute

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was more narrowly drawn than Washington statute in *Troxel*), *cert. denied*, 534 U.S. 953, 122 S.Ct. 351, 151 L.Ed.2d 265 (2001); *Lopez v. Martinez*, 85 Cal.App.4th 279, 102 Cal.Rptr.2d 71 (2000) (finding that California grandparent visitation statute was "not affected" by *Troxel* because statute was more narrowly drawn than Washington statute); *Galjour v. Harris*, 795 So.2d 350 (La.Ct.App.) (holding Louisiana grandparent visitation statute constitutional because it was more limited than Washington statute in *Troxel*), *writ denied*, 793 So.2d 1229, 1230(La.), *cert. denied*, 534 U.S. 1020, 122 S.Ct. 545, 151 L.Ed.2d 422 (2001); *Blakely v. Blakely*, 83 S.W.3d 537 (Mo.2002) (en banc) (finding Missouri grandparent visitation statute constitutional because statute avoids Washington statute's "sweeping breadth" in several respects); *State ex rel. Brandon L. v. Moats*, 209 W.Va. 752, 551 S.E.2d 674 (2001) (holding West Virginia grandparent visitation constitutional because it is much narrower than the Washington statute in *Troxel*). Although such an approach necessarily precludes clear categorization, the leitmotif that runs through those cases is that the best interests standard standing alone, will not survive a constitutional challenge, although what more is needed is left unspoken. *See Roberts, supra*, 41 *Fam. Ct. Rev.* at 26-27 (stating that post-*Troxel* decisions have recognized that best interests standard alone, without some deference to parents, does not adequately protect parental autonomy); *Developments in the Law--The Law of Marriage and Family-- Changing Realities of Parenthood: The Law's Response to the Evolving American Family and Emerging Reproductive Technologies*, 116 *Harv. L.Rev.* 2052, 2059 (2003) (noting that *Troxel* demands "something more" than best interests standard to safeguard parental autonomy). Those courts essentially accept *Troxel's* instruction that best interests is insufficient to

intrude on parental autonomy. See *Troxel, supra*, 530 U.S. at 67-68, 120 S.Ct. at 2061, 147 L.Ed.2d at 57-58

[827 A.2d 220] (explaining that trial court cannot overrule fit parent's decision "based solely on the judge's determination of the child's best interests").

VIII

Unlike our sister states, many of which felt compelled to develop a new and constitutionally appropriate standard for grandparent visitation, we have, as recently as 2000, confronted the issue in a cognate setting. In *Watkins v. Nelson*, 163 N.J. 235, 748 A.2d 558 (2000), we were faced with a struggle between the grandparents and a natural father over the custody of a nineteen-month-old child. The grandparents' daughter, who was the child's mother and custodial parent, had died. The Appellate Division, applying a best interests standard, ruled in favor of the grandparents. We reversed, based on our conclusion that the application of that standard violated the fundamental right of the father to family autonomy. In so ruling, Justice Coleman, speaking for the Court, reiterated that

the right of natural parents to the custody, care and nurturing of their children has risen to the stature of a fundamental right and deserves special protection. *Santosky v. Kramer*, 455 U.S. 745, 753, 102 S.Ct. 1388, 1394, 71 L.Ed.2d 599[, 606] (1982); *Stanley v. Illinois*, 405 U.S. 645, 651-652, 92 S.Ct. 1208, 1212-1213, 31 L.Ed.2d 551[, 558-59] (1972) (and cases cited); *In re Guardianship of Dotson*, 72 N.J. 112, 122, 367 A.2d 1160 (1976) (Pashman, J., concurring); *State v. Perricone*, 37 N.J. 463, 472, 181 A.2d 751 (1962), *cert. den[ied]*, 371 U.S. 890, 83 S.Ct. 189, 9 L.Ed.2d 124 (1962). See *In re N.*, 96 N.J. Super. 415, 424-425 n. 5, 233 A.2d 188 (App.Div.1967). [*Watkins, supra*, 163 N.J. at 245, 748 A.2d 558 (quoting *In re D.T.*, 200 N.J. Super. 171, 176-77, 491 A.2d 7 (App.Div.1985)).]

In setting forth an appropriate standard, he stated:

Since the right of parents to the custody of their minor children is both a natural and legal right, the law should not disturb the parent/child relationship except for the strongest reasons and only upon a clear showing of a parent's gross misconduct or unfitness or of other extraordinary circumstances affecting the welfare of the child. See 59 [*Am.Jur.2d*] *Parent and Child*, § 25 at 107-108 (1971).

[*Watkins, supra*, 163 N.J. at 245, 748 A.2d 558 (quoting *In re D.T., supra*, 200 N.J. Super. at 176-77, 491 A.2d 7).]

Justice Coleman went on to characterize that standard as deeply rooted in our jurisprudence:

Not surprisingly, the concept that a presumption of custody exists in favor of a parent, and that only a showing of unfitness, abandonment, gross misconduct, or "exceptional circumstances" will overcome this presumption, is steeped in the history and common law of this State. See, e.g., *In re D.T., supra*, 200 N.J. Super. at 175-76, 491 A.2d 7; *E.T. v. L.P.*, 185 N.J. Super. 77, 84, 447 A.2d 572 App.Div.1982) ; *S. v. H.M. & E.M.*, 111 N.J. Super. 553, 558-59, 270 A.2d 48 (App.Div.1970); *Kridel v. Kridel*, 85 N.J. Super. 478, 489, 205 A.2d 316 (App.Div.1964); *In re Mrs. M.*, 74 N.J. Super. 178, 183-84, 186, 181 A.2d 14 (App.Div.1962); *In re Adoption of B. by E. & R.*,

152 N.J.Super. 546, 551, 378 A.2d 90 (Union County Ct.1977); *Jacobson v. Jacobson*, 146 N.J.Super. 491, 497, 370 A.2d 65 (Ch.Div.1976); *Ex parte Alsdorf*, 142 N.J.Eq. 246, 252-53, 59 A.2d 610 (Ch.1948); *Gardner v. Hall*, 132 N.J. Eq. 64, 78, 26 A.2d 799 (Ch.1942), *aff'd* [,] 133 N.J.Eq. 287, 31 A.2d 805 (E. & A.1943); *Pope v. Brown*,

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3 N.J. Misc. 572, 572-73, 128 A. 851 (Ch.1925) ; *Hesselman v. Haas*, 71N.J.Eq. 689, 694, 64 A. 165 (Ch.1906).

[*Watkins, supra*, 163 N.J. at 246, 748 A.2d 558.]

He explained:

The principle that a showing of gross misconduct, unfitness, neglect, or "exceptional circumstances" affecting the welfare of the child will overcome this presumption, is a recognition that a parent's right to custody is not absolute. That parental right must, at times, give way to the State's *parens patriae* obligation to ensure that children will be properly protected from serious physical or psychological harm. *In re Guardianship of K.H.O.*, 161N.J. 337, 347, 736 A.2d 1246 (1999); *In re Guardianship of J.C.*, 129 N.J. 1, 10, 608 A.2d 1312 (1992). This has been our law for more than a century. As early as 1889, the highest Court in this State allowed the presumption in favor of a natural parent to be overcome by a showing of "exceptional circumstances." *Richards v. Collins*, 45 N.J.Eq. 283, 17 A. 831 (E. & A. 1889). More recently, in *Sorentino v. Family & Children's Soc. of Elizabeth*, 72 N.J. 127, 131-132, 367 A.2d 1168 (1976), *appeal after remand*, 74 N.J. 313, 378 A.2d 18 (1977), the Court acknowledged that even if parental rights cannot be terminated on statutory grounds, "exceptional circumstances" based on the probability of serious psychological harm to the child may deprive a parent of custody. *Ibid. Sees v. Baber*, 74 N.J. 201, 221-22, 377 A.2d 628 (1977), recognized the same principle.

[*Watkins, supra*, 163 N.J. at 246-47, 748 A.2d 558.]

Importantly, in distinguishing between best interests and the proper standard--gross misconduct, unfitness, or exceptional circumstances--Justice Coleman observed:

A significant difference between the child's best interests test and the parental termination or "exceptional circumstances" standard is that the former does not always require proof of harm to the child. In contrast, *the latter always requires proof of serious physical or psychological harm or a substantial likelihood of such harm.*

[*Id.* at 248, 748 A.2d 558 (emphasis added).]

In other words, avoiding harm to the child is polestar and the constitutional imperative that is necessary to overcome the presumption in favor of the parent's decision and to justify intrusion into family life.

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Once the presumption is overcome, *Watkins* explains the methodology to be adopted:

The standard that controls a custody dispute between a third party and a parent involves a two-step analysis. The first step requires application of the parental termination standard or a finding of "exceptional circumstances." Although an award of custody to a third party does not involve a termination of all parental rights, "such an award destroys any pretense of a normal

parent-child relationship and eliminates nearly all of the natural incidents of parenthood including everyday care and nurturing which are part and parcel of the bond between a parent and child." *Zack v. Fiebert*, 235 N.J.Super. 424, 432, 563 A.2d 58 (App.Div.1989). "It is cardinal [in our society] that the custody, care and nurture of the child reside first in the parents." *Ginsberg v. New York*, 390 U.S. 629, 639, 88 S.Ct. 1274, 1280, 20 L.Ed.2d 195 [, 204] (1968). Because the right to custody is a fundamental one protected by the constitution, *In re Guardianship of K.H.O.*, *supra*, 161 N.J. at 347, 736 A.2d 1246, the parental termination or "exceptional circumstances"

[827 A.2d 222]

standard is required to pass constitutional muster in this type of custody dispute. That principle is consistent with *Zack* and *Todd*, which stand for the proposition that when a third party, such as a stepparent, establishes psychological parentage with the child, the third party stands in the shoes of a natural parent. *Zack*, *supra*, 235 N.J.Super. at 432-33, 563 A.2d 58; [*Todd v. Sheridan*, 268 N.J.Super. 387, 397, 633 A.2d 1009, 1014 (App.Div.1993)]. That means that when the "exceptional circumstances" prong is satisfied, for example by establishing that the third party has become a psychological parent, the standard for determining custody is the same as between two fit parents: the child's best interest test articulated in N.J.S.A. 9:2-4c. *Zack*, *supra*, 235 N.J.Super. at 433, 563 A.2d 58.

If either the statutory parental termination standard or the "exceptional circumstances" prong is satisfied, the second step requires the court to decide whether awarding custody to the third party would promote the best interests of the child. A child's "best interests" standard "does not contain within it any idealized lifestyles." [*In re Baby M*, 109 N.J. 396, 460, 537 A.2d 1227, 1260 (1988)]. It "can never mean the better interest of the child." *Division of Youth [&] Family [Servs.] v. A.W.*, 103 N.J. 591, 603, 512 A.2d 438 (1986). "It is not a choice between a home with all the amenities and a simple apartment, or an upbringing with the classics on the bookshelf as opposed to the mass media, or even between parents or providers of vastly unequal skills." *Ibid.* (citations omitted). That said, the point to be emphasized is that the best interest of the child cannot validly ground an award of custody to a third party over the objection of a fit parent without an initial court finding that the standard for termination of the rights of a non-consenting parent or the "exceptional circumstances" prong has been satisfied.

[*Watkins*, *supra*, 163 N.J. at 253-55, 748 A.2d 558.]

Because the Grandparent Visitation Statute is an incursion on a fundamental right (the right to parental autonomy), under *Watkins*, it is subject to strict scrutiny and must be narrowly tailored to advance a compelling state interest. Our

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prior jurisprudence establishes clearly that the only state interest warranting the invocation of the State's *parens patriae* jurisdiction to overcome the presumption in favor of a parent's decision and to force grandparent visitation over the wishes of a fit parent is the avoidance of harm to the child. When no harm threatens a child's welfare, the State lacks a sufficiently compelling justification for the infringement on the fundamental right of parents to raise their children as they see fit. However, when harm is proved and the presumption in favor of a fit parent's decision making is overcome, the court must decide the issue of an appropriate visitation schedule based on the

child's best interests.

Although *Troxel* avoided confronting that issue directly, we are satisfied that prior United States Supreme Court decisions fully support our conclusion that interference with parental autonomy will be tolerated only to avoid harm to the health or welfare of a child. *Compare Yoder*, 406 U.S. at 230, 92S.Ct. at 1540-41, 32 L.Ed.2d at 33-34 (noting that interference with childrearing was not justified because Amish children would not be physically or mentally *harmed* from receiving an Amish education as opposed to public education (emphasis added)); *Stanley, supra*, 405 U.S. at 649, 92 S.Ct. at 1211, 31 L.Ed.2d at 557 (requiring showing of parental *unfitness* with concomitant harm to child before terminating unwed father's parental rights **[827 A.2d 223]** (emphasis added)); *Pierce, supra*, 268 U.S. at 534, 45 S.Ct. at 573, 69 L.Ed. at 1078 (holding that state's interest was inadequate to justify interference in family life because children were not *harmed* by parents' decision to send their children to private schools as those schools fulfilled their obligations (emphasis added)); *Meyer*, 262 U.S. at 403, 43S.Ct. at 628, 67 L. Ed. at 1046-47 (striking down state law that forbade children from learning foreign language because, among other things, such knowledge was not "so clearly *harmful* as to justify its inhibition with the consequent infringement of rights long freely enjoyed" (emphasis added)), *with Prince, supra*, 321 U.S. at 169-70, 64 S.Ct. at 444, 88 L.Ed. at 654 (upholding parent's conviction for violating state child labor laws because selling

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religious magazines to public could lead to emotional, psychological, or physical *injury* to child (emphasis added)).

In reaching that conclusion, it bears repeating that a dispute between a fit custodial parent and the child's grandparent is not a contest between equals. We have long recognized that the best interest standard, which is the tiebreaker between fit parents, ^[3] is inapplicable when a fit parent is in a struggle for custody with a third party. *Watkins, supra*, 163 N.J. at 253-54, 748 A.2d 558; *Todd, supra*, 268 N.J.Super. at 396-97, 633 A.2d 1009; *Zack, supra*, 235 N.J.Super. at 432-33, 563 A.2d 58.

Because custody and visitation applications by a third party both implicate the right to family autonomy and privacy, both are subject to the same constitutional protection. See, e.g., *R.S.C. v. J.B.C.*, 812 So.2d 361, 369 (Ala.Civ.App.2001) (noting that visitation is essentially form of temporary custody while it is being exercised) (footnote omitted); *Roth, supra*, 789A.2d at 447 n. 13 (remarking that "[v]isitation is 'a limited form of custody during the time the visitation rights are being exercised'" (quoting *In re Marriage of Gayden*, 229 Cal.App.3d 1510, 280 Cal.Rptr. 862 (1991))). Nevertheless, it would be unrealistic not to distinguish between an award of custody to a third party and grandparent visitation based on the level of intrusion into family life that each entails. The former is obviously a greater invasion of family autonomy and privacy than the latter. It is for that reason that we have declined to adopt the position of our colleague who would

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require grandparents to prove by clear and convincing evidence the necessity for visitation to avoid harm to the children. *Post* at 122, 827 A.2d at 228 (Verniero, J., concurring in part, dissenting in part). We instead approve the preponderance of the evidence burden in the statute

as fully protecting the fundamental rights of parents when coupled with the harm standard.

Thus, in every case in which visitation is denied, the grandparents bear the burden of establishing by a preponderance of the evidence that visitation is necessary to avoid harm to the child. The grandparents' evidence can be expert or factual. For example, they may rely on the death [827 A.2d 224] of a parent or the breakup of the child's home through divorce or separation. In fact, many of the fifty grandparent visitation statutes specifically recognize the potential for harm when a parent has died or a family breakup has occurred and visitation is denied. 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. See, e.g., *Roth, supra*, 789 A.2d at 445 (noting that proof of substantial, emotional ties between child and nonparent could result in harm to child if contact with that person is denied or curtailed); *Blixt, supra*, 774 N.E.2d at 1060 (observing that "[t]he requirement of significant harm presupposes proof of a showing of a significant preexisting relationship between the grandparent and the child"). The possibilities are as varied as the factual scenarios presented.

If the court agrees that the potential for harm has been shown, the presumption in favor of parental decision making will be deemed overcome. At that point, the parent must offer a visitation schedule. If the grandparents are satisfied, that will be the end of the inquiry. If not, a second step will be undertaken--an assessment of the schedule. The presumption in favor of parental decision making having been overcome, the court should approve a schedule that it finds is in the child's best interest, based on the application of the statutory factors. See N.J.S.A. 9:2-7.1 (listing statutory factors); *Watkins, supra*, 163 N.J. at 254, 748 A.2d 558 (noting that once "exceptional circumstances" are found, court should award custody based on child's best interests).

When visitation is not denied outright but the grandparents challenge the sufficiency of the proffered schedule, the same standard will apply. They will be required to prove that visitation is necessary and that the proffered visitation schedule is inadequate to avoid harm to the child. Once those proofs satisfy the court and the presumption in favor of parental decision making is overcome, the court will be required to develop a schedule that is in the child's best interest based on the statutory factors.

Our resolution results in sustaining 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. All other provisions of the statute remain intact. We note that where necessary to save a statute, "appropriate construction [to] restore [it] to health" is a well-established rule. *First Family Mortgage Corp. v. Durham*, 108 N.J. 277, 290, 528 A.2d 1288 (1987), *appeal dismissed*, 487 U.S. 1211, 108 S.Ct. 2860, 101 L.Ed.2d 897, *and cert. dismissed*, 487 U.S. 1213, 108 S.Ct. 2863, 101 L.Ed.2d 899 (1988).

IX

We turn now to the trial court's findings. Procedurally, the court took pains to recognize *Troxel*; stated that it was giving "great deference to Mr. Moriarty's request by way of visitation"; and determined that the burden of proof was on the grandparents. The court then made findings of fact, addressing each of the statutory factors.

Regarding the relationship between the children and the grandparents, the court observed:

In this case we have a situation where the children have a very extensive relationship with the grandparents. They spent years where they were seeing the grandparents every other weekend. This is not the usual situation with grandparents, this is a closer relationship.

[827 A.2d 225]

They spent much more time with the grandparents than in many other families. I had in evidence photographs taken by the

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grandparents at some of the family outings with the grandchildren which substantiate the testimony of the grandparents as to the many, many activities that took place when they were with the children from basically the children's very early years until the present time.

....

Also, the relationship between the children and the grandparents is significant in a different way because their mother has died recently. Their link to their mother is through their grandparents and through that branch of the family. These children are very aware and were very bonded apparently with their mother and very distressed by her death and very upset by her death.

....

In any event, the children have a relationship, a special relationship with their grandparents, not only because they spent so much time with them in the past and have gone to so many different activities and have learned a lot educationally and have a bond with their cousin, but also because it is through their grandparents that they can reconnect with their mother. Brian in particular indicated in the Family Services report that he hears his mother speaking to him upon occasion. I think the [Moriartys] have made efforts to give treatment and help and counseling to these children. They understand that they suffered a loss. But the grandparents can offer the children a link with their mother, a love for their mother, an understanding of their mother, a sense of being whole with their mother and their mother's side of the family that cannot be obtained elsewhere.

The court then turned to the relationship between the Moriartys and the grandparents: There is a very bad relationship between Mr. [Moriarty] and the Bradts. The Family Services report indicates that Mr. [Moriarty] has alienated the children from the grandparents and that he tried to prevent visitation between [the mother] and the children. Mr. [Moriarty], when he testified about his former in-laws, he could not completely contain his hostile emotions. I had to ask him several times to keep his voice down because he raised his voice. When referring to the grandparents he said that they were evil. That he had a Christian household and they were evil. He described them as being alcoholics, drug addicts and murderers. He described the grandfather as consistently hitting the children. He described the grandmother as being an alcoholic, as he also described the grandfather that way. He said that the grandfather had molested [the mother]. There seems to be some indication that [the mother] indicated that she was molested by her grandfather, not the party in this case. But Mr. [Moriarty] testified that it was Jack Bradt who had molested [the mother].

Mr. [Moriarty] blamed the Bradts completely and totally for the problems that their daughter Julie suffered. It was his view that they caused this problem and it was his, Mr. [Moriarty]'s, obligation to protect Brian and Tara from the evil influence of the grandparents. Mr. [Moriarty] has to his credit tried to modify some of these extreme views most of the time when he talks about the situation, but under oath on the stand I think I'm quite accurate in

[827 A.2d 226]

reflecting what his emotional and belief system is towards the grandparents.

So that through the litigation he talks about the activities that the children have and the fact that the grandparents want to interfere with these activities, but when pressed on the stand he admitted that it wasn't the activities so much as the influence which the grandparents have on the children which is what he is trying to protect them from. And that makes absolute sense to me. It isn't that he is so worried that one of the children might miss hockey practice or might not get to go to a birthday party, it is because he is, in his view and his opinion these grandparents exercise an evil influence on the children. And so with regard to that factor, the relationship between the children's father and the grandparents is a poor relationship and there has been significant hostility. I mentioned the domestic violence restraining order that was granted to the grandmother against the father and there have been other police interaction, some of which were testified to and some of which were not, but were in the papers.

The time that has elapsed since the children last had contact with the applicants was addressed this way:

This is not a situation where the children have not had contact with the grandparents for a long time. There has been visitation ordered.... [T]here has been contact as recently as October, last month. So there's been a lot of contact recently between grandparents and grandchildren.

The court then turned to the effect that visitation will have on the relationship between the children and the children's parents. Of that, the court stated:

I don't think visitation will have any effect on the relationship between Tara and Brian and their father and stepmother. By all accounts the [Moriartys] have a very close relationship with Tara and Brian and I cannot see that these children having visitation with their grandparents, whatever the duration, is going to affect the children's relationship with their parents, that is with their father and their stepmother. I do think that the [Moriartys] understand, I hope that they understand, I think that they understand, that denigrating and putting down the grandparents to the children is a very destructive thing to do and I would expect that they would not do that. I know there are allegations back and forth that the adults say negative things about each other, but I would expect them not to do that in front of the children.

With respect to the good faith of the grandparents, the court observed:

The grandparents here are filing the application in good faith and I think that they have modified their request in good faith because they have testified under oath that they consulted with various

professionals about the extent to which they should be involved with their grandchildren's life and again, for whatever reasons but that being one of them, they have withdrawn the requests that they made earlier.

....

However, they are in total good faith in their application and in filing this. They want to spend time and be a part of their grandchildren's lives. They love their grandchildren and they believe that it is in their grandchildren's best interest to have regular extensive contact with their grandparents.

[827 A.2d 227] The court also found that there was no history of emotional, physical, or sexual abuse or neglect by the grandparents.

The trial court's most critical findings were as follows:

The other factor that I would put in here would be the death of the mother and the fact that it is extremely important that the children continue a bond with their mother's side of the family. And the experts all agreed on that. Family Services agreed on it and Dr. Judith Brown [Greif] agreed on it, that it was important that there be extensive visitation with the grandparents.

....

Dr. [Greif], who did not interview the parties but she read the Family Services evaluation and took their evaluation to be accurate in terms of what they found, and she indicated that this in her view, and she is very well regarded and very knowledgeable and very experienced in matters of custody evaluations and strained relationships, and she said that if, in fact, as the Family Services found that the [Moriartys] were alienating the children from their grandparents, that that alienation could not be counteracted with a short visit. That it requires the time for the children to be immersed in the environment of the grandparents to get away from the alienation and be able to have a good time with the grandparents without feeling guilty towards the father and their stepmother that they are having a good time with the grandparents.

....

I asked Dr. [Greif] whether any harm would come to the children if visitation was as limited as that requested by Mr. [Moriarty] and what she said is that allowing such limited visitation would allow the alienation by the father and his wife towards the grandparents to succeed. Because let me just say, the reason I asked Dr. [Greif] this is because it seemed to me that certainly the possibility was there that putting these children in between these adults who are so hostile towards each other would be a negative thing for them and maybe it would be just better, since they're with Mr. [Moriarty] who's a fit parent and his wife, to just keep them there and let them have them give up their relationship with the grandparents and at least there would not be so much strife. So I asked Dr. [Greif] what would the harm be of allowing only the limited visitation that Mr. [Moriarty] is requesting. The answer is the harm would be that the alienation would succeed and that the children would believe essentially that half of them, that their mother's half is evil, is damaged, is

bad, and that this would cause self-esteem problems for the children since the children know that they're made up of their mother and their father. So if their mother's family is so evil and bad, it means that the children themselves, it would mean to the children, that they themselves are half bad or half evil and that this would be a very destructive thing psychologically for these children.

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The court went on to establish the visitation order previously described and stated:

The reason that I am interfering, if you will, with Mr. [Moriarty]'s desire with regard to this other visit is to protect the children from the harm that would befall them if they were alienated from their grandparents. This trip once every two months for two overnights would allow the children to be in the environment of their grandparents. Allow

[827 A.2d 228]

them to continue to go on outdoors activities. To continue from time to time through the year to meet with their cousin Natalie. To have other family activities with the extended family of their mother. And to know that they are still a full and complete part of that family.

In a sense, the court presaged our opinion by the finding that visitation with the grandparents was necessary to avoid harm to the children. That finding, which was fully supported by the record, overcame the presumption in favor of Moriarty's decision making and allowed the court to fashion carefully a schedule to serve the children's best interests.

X

The judgment of the Appellate Division is reversed. The order of the trial court is reinstated. VERNIERO, J., concurring in part, dissenting in part.

I concur in much of the Court's opinion. Specifically, I agree that a fit parent's decision regarding his or her child's visitation with a non-parent can be overridden only by evidence of demonstrable physical or psychological harm to the child. Unlike the majority, however, I believe that the movant must establish such harm by clear and convincing proof, not by a simple preponderance of the evidence. In that respect, I subscribe entirely to the view articulated by the American Civil Liberties Union in its *amicus* brief:

The existence of demonstrable harm is a fact-intensive inquiry that of course should be performed by the trial court in the first instance. It may well embrace the concept of emotional injury that a child may suffer if a previously established positive relationship with a grandparent or sibling is suddenly severed. But because the court necessarily acts with less than complete knowledge and understanding of all the complex factors that are relevant in making this determination, and because special deference must be afforded to the wishes of the parent, an

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additional procedural safeguard is needed to compensate for this inherent limitation in the judicial fact-finding process. A finding that harm exists should be proved not merely by a simple preponderance of the evidence standard, but by the enhanced "clear and convincing evidence" standard that applies when individual constitutional interests are at stake. [See, e.g.,] *Santosky v. Kramer*, 455 U.S. 745[, 102S.Ct. 1388, 71 L.Ed.2d 599] (1982) (requiring clear and convincing evidence of neglect to terminate parental rights); *V.C. v. M.J.B.*, 163 N.J. 200, 748A.2d 539[, cert.

denied, 531 U.S. 926, 121 S.Ct. 302, 148 L.Ed.2d 243] (2000) (requiring clear and convincing evidence of harm to deny psychological parent visitation). See generally, *Anderson v. Liberty Lobby, Inc.*, 477U.S. 242[, 106 S.Ct. 2505, 91 L.Ed.2d 202] (1986) (requiring clear and convincing evidence in establishing actual malice in libel case); *E.B. v. Verniero*, 119 F.3d [1077] (3d Cir.1997) (requiring clear and convincing evidence, rather than mere preponderance of evidence, of probability of reoffense in Megan's Law notification in order to overcome due process and privacy interests of registrant)[, *cert. denied sub nom.*, *W.P. v. Verniero*, 522 U.S. 1109, 118 S.Ct. 1039, 140 L.Ed.2d 105 (1998)].

In allegations of psychological harm, it is often easy, and perhaps too easy, to articulate a colorable claim of such harm

[827 A.2d 229]

and thereby undermine parental judgment. Thus, the "clear and convincing evidence" standard can be of very real assistance in mandating adherence to constitutional norms, particularly in cases such as this, where the "harm" that would allegedly result from curtailing, but not eliminating, visitation between the Bradts and their grandchildren has been colorably articulated, but perhaps not convincingly demonstrated.

The Court appropriately models its approach on the standard articulated in our prior case, *Watkins v. Nelson*, 163 N.J. 235, 748 A.2d 558 (2000). We were not required in *Watkins* to specify whether a clear and convincing showing of harm would be required in the present setting. We did, however, observe that "the law should not disturb the parent/child relationship except for the strongest reasons and only upon a clear showing of a parent's gross misconduct or unfitness or of other extraordinary circumstances affecting the welfare of the child." *Id.* at 245, 748 A.2d 558 (internal quotation marks and citation omitted). I construe that statement as being consistent with our imposing a clear and convincing burden of proof within the context of the current dispute.

I do not wish to prolong this litigation any more than is necessary. Given the fundamental constitutional issues at stake, however, I see no choice but to direct a remand to the trial court for further proceedings. It would be best for the children, of course, if the parties were to resolve their differences amicably

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and without further judicial involvement. Absent that resolution, which no longer appears possible, the trial court must intervene. It should do so only after permitting the parties to argue and submit additional evidence, if any, consistent with the elevated burden of proof to which I have adverted. If the movants succeed in satisfying that burden, then the trial court should approve a visitation schedule in the same manner set forth by the majority.

To summarize: I do not condone plaintiff's reaction to the Bradts. As the trial court found, however, there is no allegation that plaintiff is an unfit parent. As a result, plaintiff's decision in respect of visitation should be immune from judicial intervention absent a showing by clear and convincing evidence of harm to the children. Accordingly, I would remand the matter to the trial court to determine whether that standard has been satisfied. Both children are now teenagers and soon will be of age to decide these issues for themselves. The process, however, is best served by the trial court ratifying, modifying, or rescinding its prior decision after it applies what I perceive

to be the correct test. In all other respects, I agree with the Court's opinion.

For reversing and reinstating--Chief Justice PORITZ and Justices COLEMAN, LONG, LaVECCHIA, ZAZZALI, and ALBIN--6.

Concurring in part dissenting in part--Justice VERNIERO--1.

Notes:

[1] See *Troxel, supra*, 530 U.S. at 73-74 n. *, 120 S.Ct. at 2064 n. *, 147 L.Ed.2d at 61 n. * (setting forth grandparent visitation statutes in all fifty states); Maegen E. Peek, Note, *Grandparent Visitation Statutes: Do Legislatures Know the Way to Carry the Sleigh Through the Wide and Drifting Law?*, 53 *Fla. L.Rev.* 321, 326 n. 30 (2001) (citing same).

[2] Justices Stevens, Scalia, and Kennedy each dissented on different grounds. Justice Stevens specifically rejected the requirement of a threshold showing of actual or potential harm to the child before nonparental visitation is permissible. *Id.* at 85-86, 120 S.Ct. at 2070-71, 147 L.Ed.2d at 68-69 (Stevens, J., dissenting). He instead invoked a balancing approach, weighing all of the interests at stake in any given case. *Id.* at 88-89, 120 S.Ct. at 2072, 147 L.Ed.2d at 70 (Stevens, J., dissenting). Justice Scalia would have reversed. *Id.* at 93, 120 S.Ct. at 2075, 147 L.Ed.2d at 73 (Scalia, J., dissenting). In his opinion, state legislatures are the prime determiners of family law principles. *Id.* at 93, 120 S.Ct. at 2074-75, 147 L.Ed.2d at 73 (Scalia, J., dissenting). He further questioned the validity of any substantive due process right to parent a child. *Id.* at 92, 120 S.Ct. at 2074, 147 L.Ed.2d at 72-73 (Scalia, J., dissenting). Justice Kennedy agreed that parents have a Fourteenth Amendment right to parent their children without undue state interference, *id.* at 95, 120 S.Ct. at 2076, 147 L.Ed.2d at 74-75 (Kennedy, J., dissenting), but argued that the Constitution does not foreclose application of the best interests of the child standard in any visitation proceeding, *id.* at 98-99, 120 S.Ct. at 2077-78, 147 L.Ed.2d at 76-77 (Kennedy, J., dissenting).

[3] See *Watkins, supra*, 163 N.J. at 253, 748 A.2d 558 ("When the dispute is between two fit parents, the best interest of the child standard controls because both parents are presumed to be equally entitled to custody."). That is also the standard to be applied to a contest between a fit parent and one who has stood in the shoes of the parent to the child (*i.e.* a psychological parent). See *V.C., supra*, 163 N.J. at 227-28, 230, 748 A.2d 539 ("When there is a conflict over custody and visitation between the legal parent and a psychological parent, the legal paradigm is that of two legal parents and the standard to be applied is the best interests of the child."). Although a grandparent could qualify as a psychological parent if he or she had functioned as a parent, that is not the case here.
