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The grandparents' ruling gains favor

By MichaelAnn Knotts



here's growing sentiment among seasoned family lawyers embracing the recent precedent-setting decision of the New Jersey Supreme Court on grandparent visitation.

That's the general finding of interviews conducted by *New Jersey Lawyer* since the high court's ruling last month that grandparents seeking visitation against the wishes of a fit parent must demonstrate the children will be harmed if visitation is limited or denied.

The decision in *Moriarty v. Bradt* will most likely benefit grandparents already playing an active role in their grandchildren's lives, attorneys said, noting the ruling sets important ground rules.

"*Moriarty* clears up misconceptions about grandparent visitation statutes," said Denville attorney Bonnie C. Frost, explaining many attorneys thought the U.S. Supreme Court's landmark decision in 2000 in *Troxel v. Granville* had effectively "obviated the New Jersey statute" on grandparent visitation.

Not so, said the New Jersey justices, addressing the issue for the first time since *Troxel*.

In that case, the federal court found Washington State's grandparent statute unconstitutional due to its "sweeping breadth."

"*Moriarty* is clear; people know where they stand," said Frost, noting the standard that grandparents show harm to the children by a preponderance of the evidence represents an "appropriate balancing."

In requiring such evidence, said Somerville attorney Jeralyn Lawrence, *Moriarty* "specifically enunciates a factor that is inherently present in the eight factors specified in the New Jersey statute."

"After *Troxel* came out, courts didn't want to touch" the issue of grandparent visitation, and "grandparents' rights were being whittled away," said Lawrence.

Although *Moriarty*, authored by Justice Virginia A. Long, "doesn't exactly level the playing field, it adds leverage and ammunition on behalf of grandparents that was needed after *Troxel*," Lawrence noted.

John P. Paone Jr. of Woodbridge, too, said "Justice Long got it right."

He views the decision as "a victory for grandparents across the board, even though it makes a little more difficult what they have to do."

He sees little chance of *Moriarty* being set aside.

The opinion appeared to be "written with the understanding there is going to be federal review. It's pretty airtight," he stated.

Morristown attorney Candace Kopf Scott hailed the decision as "on point," noting "*Moriarty* is an excellent primer as to what statutes and case law provide."

Scott, who has represented both grandparents seeking visitation and parents resisting it, said such cases are "truly fact-sensitive" and require "thoroughgoing analysis and evaluation." She said the *Moriarty* decision was absolutely fact-sensitive, and therefore appropriate.

"Grandparents can be invaluable in a child's life," added Scott. "They can give a sense of acceptance that's unconditional and provide a form of social immunity a child can't get anywhere else.

"But like every other group in society, there are some good grandparents and some bad ones," Scott stated. "Therefore, the court was right to identify parenting as a fundamental liberty and then move to identify the role the particular grandparents play."

Hackensack lawyer Robert T. Corcoran, Patrick Moriarty's attorney, disagrees with the decision, contending the court in *Troxel* found there was no compelling state interest to justify interfering with the constitutional rights of a fit parent.

"There was none in this case either," Corcoran asserted.

He will seek certification for an appeal to the U.S. Supreme Court.

But Paone, like Scott, said the decision "gives deference to the authority of parents to raise their children."

He said Long "took a kind of Solomon approach" by putting the burden on the grandparents, but not making it "so hard it can't be met."

Cary B. Cheifetz of Summit, immediate past chairman of the Family Law Section of the New Jersey State Bar Association, called the decision "troubling," saying, "I have great concern that parenting-time issues are moving away from the best interests of the child.

"It seems to me it should be more incumbent on the parents to show the visitation will be harmful to the child than for the grandparents to show withholding it will be," said Cheifetz.

But others, like Toms River attorney Jeff J. Horn, see concern for children's best interests as inherent in the decision.

"The decision is good for our system and the children," he said. "It recognizes the societal reality that many grandparents are deeply involved in their grandchildren's lives."



Jeralyn Lawrence

Francis W. Donahue of Short Hills, who represented the grandparents, Lynn Jack and Patricia Bradt, believes the court ruled for his clients "due to the facts of the case." They were the children's link to their deceased mother.

He said it might be more difficult for grandparents to show potential harm when both parents are alive.

Donahue said the Bradts were able to meet the burden because their expert testified "children get their sense of self from both parents. If one parent presents the other in a bad light, the children need someone to present that parent in a favorable light." The Bradts fulfilled that role for their grandchildren.

"Before this decision, there didn't necessarily have to be expert testimony" in a grandparental visitation case, Donahue noted. Now it will be a prerequisite because "a preponderance of the evidence" of harm "is determined by psychological or psychiatric expert opinion."

Given that, it's likely costs will escalate, trial time and trial preparation will increase, Donahue noted.

"My hope and guess is, that's not going to be the case, said Horn. "My gut reaction is trial judges use common sense more on grandparent issues than any other kind of case. And if their own extended family was tight-knit, it colors their thinking more in grandparent cases than other kinds."

Frost pointed out the opinion specifies "the grandparents' evidence can be either expert or factual."

"As a lawyer, there's the issue of whether you are going to be subject to a malpractice suit if you don't have an expert," she said. "But if the facts are particularly outrageous, it may be perfectly OK just to present those facts."

She, Paone and others noted the decision cuts both ways.

"For grandparents who have been involved in their grandchildren's lives, *Moriarty* provides a way to reaffirm that relationship," said Frost. "But in cases where you don't have that kind of involvement, it will be a very different story."

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