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**SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-0033-22**

S.K.,

Plaintiff-Appellant,

v.

A.K. and
Y.K.,

Defendants-Respondents.

Submitted September 26, 2023 – Decided October 26, 2023

Before Judges Gilson and Berdote Byrne.

On appeal from the Superior Court of New Jersey,
Chancery Division, Family Part, Somerset County,
Docket No. FD-18-0177-22.

Offit Kurman, PA, attorneys for appellant (Rawan T.
Hmoud, of counsel and on the briefs; Jodi Argentino,
on the briefs; Emily Ingall, on the brief).

Detommaso Law Group, LLC, attorneys for respondent
A.K. (Joseph M. Freda, III, of counsel and on the brief).

Respondent has not filed a brief.

PER CURIAM

Plaintiff-grandmother (Grandmother) appeals from two Family Part orders. The first order, dated June 30, 2022, granted Grandmother virtual grandparent visitation to her three grandchildren but denied in-person visitation temporarily, while her son's criminal sexual abuse case was pending. The second order, dated July 25, 2022, granted, in part, defendant-mother's (Mother) request for counsel fees and awarded her \$39,951.50.

The first order granted Grandmother's requested relief for grandparent visitation, albeit not in-person as she requested. Grandmother fails to demonstrate the trial court abused its discretion in granting her virtual visitation instead of in-person visitation. Thus, we affirm the trial court's June 30, 2022 order. With respect to the second order, although the trial court found Grandmother's application was in bad faith, it based its award on the applicable factors. As such, it did not abuse its discretion in awarding fees. We, therefore, also affirm the July 25, 2022 order.

I.

Mother and the father of the children (Father)¹ married in 2004 and divorced in 2014. Three children were born of the marriage: R.K. (born 4/16/2005), H.K. (born 9/26/2007), and E.K. (born 4/14/2011).² In 2014, the couple divorced and entered into a Marital Settlement Agreement (MSA). Pursuant to the MSA, the couple agreed to share joint legal custody of the children. Mother became the parent of primary residence and Father exercised parenting time with the children on alternate weekends. Father resided in Grandmother's home for several years after the divorce, which resulted in the children spending every other weekend at Grandmother's home from 2014 until 2020.

In 2017, Father re-married and divided his time between Grandmother's home in Paramus and his new residence in Jersey City. Despite living at the Jersey City residence, Father continued to exercise his parenting time at Grandmother's home from 2017 until early 2020. In early 2020, the children

¹ Father had limited involvement in the later litigation and was declared a third-party defendant.

² We use initials to protect the identity of minors and alleged victims. R. 1:38-3(d)(11) and (13).

stopped all visitation at Grandmother's home because of the COVID-19 pandemic and concern for both grandparents' diminishing health and advanced age. As a result, the children spent approximately five to eight weekends at the home of their father and his new wife in Jersey City.

On May 2, 2020, Father's paramour reported him to Jersey City Police Department, alleging she found evidence of child exploitation material on his computer and in his text messages. On May 6, 2020, Father was arrested and charged with first-degree aggravated sexual assault, second-degree sexual assault, first-degree endangering the welfare of a child (pornography), and second-degree endangering the welfare of a child. His second wife was also charged. The affidavit of probable cause alleged Father sexually abused R.K. from ages 9 to 14, had R.K. engage in sexual acts with him and his new wife from 2017 to 2020, recorded some of the abuse, and sent it to his wife.

Father has remained in custody since May 6, 2020. R.K. is the only victim alleged in the criminal matter against his father. H.K. is aware of the abuse and later made similar claims of abuse against his father. E.K. does not have knowledge of his father's criminal case, the abuse allegations, or where the alleged abuse occurred.

On May 8, 2020, Mother filed for an Amended Final Restraining Order (FRO) against Father, which was granted. In relevant part, the FRO awarded Mother sole legal and physical custody of the three children and enjoined and restrained Father, ordering him to have no contact, "directly or indirectly, in any mode or manner," with any of his three children. Additionally, it enjoined and indefinitely suspended all his rights to parenting time or visitation, pending further order of the court.

A few months later, Mother filed a post-judgment motion regarding spousal support. Father filed a cross-motion requesting the court compel Mother to facilitate communication among the children, Grandmother, and their paternal grandfather on a weekly basis. The trial court denied that cross-motion without prejudice.

Grandmother then filed this action on September 13, 2021, requesting the court 1) establish in-person, video, and telephonic grandparent visitation; 2) place the matter on a complex track; 3) appoint a guardian ad litem on behalf of the children; 4) schedule a plenary hearing to determine the best interests of the children; and 5) interview R.K. Mother filed a counterclaim requesting counsel fees and costs. In her initial application, Grandmother requested the court find she had met her initial burden of showing lack of visitation would cause harm

to the children in her pleadings in accordance with Major v. Maguire, 224 N.J. 1 (2016). In a subsequent case management hearing, Grandmother argued she was entitled to discovery and Mother argued for dismissal. Grandmother also requested the court "administratively put the case on complex track."

At the next case management conference Grandmother requested limited expert discovery pursuant to the grandparent visitation statute. The court ruled it would interview R.K., and potentially all the children, then entertain oral argument regarding grandparent visitation, depending on what the children said.

On June 14, 2022, the trial court interviewed the children. E.K., then eleven years old, who was not aware of the abuse or the charges against his father, informed the court he spent a substantial amount of time with his paternal grandparents with or without his dad at their house, and he felt safe there. He stated he missed his grandparents and seeing them on video calls was not the same as seeing them in-person. He was aware his grandparents were getting older and wanted to see them before something happens to them. When asked how he felt about not seeing his grandparents, he stated he was fine with it but would like in-person more; either way he was fine.

H.K., then fourteen years old, informed the court he spent time at his grandparents' home whenever his dad had parenting time. Despite caring about

Grandmother, he was not sure he wanted to see his grandparents in-person because he did not want to be at their house. Although he did not blame them, he recalled the abuse from his father started when he was ten years old and it occurred at his grandparents' home.³ Lastly, he did not know how he felt about seeing his grandparents in-person not in their home. He felt more comfortable keeping the current arrangement where they spoke over video calls. The court asked him if he "suffered in any way emotionally, physically, or any type of injury" since not seeing his grandparents for the last two years. He responded "no, not really."

Lastly, the court interviewed R.K., then seventeen years old.⁴ He confirmed most of the sexual abuse occurred in his father's room at his grandparents' house. In one of the incidents, his father abused him and his brother, H.K., at the grandparents' home. The abuse occurred at all hours of the

³ H.K. reported to police he experienced abuse from his father, but the record is not clear as to whether his father has been charged with sexual misconduct or abuse against H.K.

⁴ R.K. has since become eighteen years old and is no longer subject to the family court's jurisdiction for parenting time or visitation purposes. See N.J.S.A. 9:2-13(b) (defining "child" as "any person under [eighteen] years of age."); see also N.J Div. of Youth & Fam. Servs. v. W.F., 434 N.J. Super. 288, 295-97 (App. Div. 2014) (finding the three older children who became eighteen over the course of the FN litigation were no longer in the purview of the court and the custody issue became moot.)

day or night, and no one intervened, although both grandparents were present in the home when the abuse occurred. He knew his grandparents were awake because he could hear people talking and his father's bedroom door was thin. He felt there were signs making it obvious his father was abusing him, but believed his grandparents did not want to suspect anything was wrong and deliberately ignored the signs. R.K. stated he was not sure in-person visitation would be "the best thing" for his brothers, and if visitation happened in his grandmother's house it would trigger memories of abuse.

After the interviews and instead of oral arguments as scheduled, the court instructed each party to prepare informal correspondence to the court regarding the substance of the interviews and the positions of the parties. It stated, "[i]f the [parties' wanted] to have further hearings, further trial, [the court was] happy to oblige."

While the court was scheduling a date for the next hearing, Grandmother's court-appointed interpreter informed the court Grandmother wanted to speak with her counsel. Instead of addressing her counsel, the interpreter translated Grandmother's statements to the court and all present. Grandmother attempted to explain she could not continue coming to court because her husband was sick,

and she needed to care for him. Then, without her interpreter and in English, plaintiff stated:

-- I'm taking care. I-- I -- I -- because my son is -- my husband -- for 15 year or 20 year he got blind and he -- removed this thing. That's why he's living -- you know, sleeping in the downstairs. I have -- to say -- because I have -- my husband has a very, very bad condition. -- we are -- not Medicare -- but --. -- please, I am begging you, I cannot afford too much money. . . . I -- I will -- very, very -- my Chase -- Chase -- Chase bank, they -- my husband went over there and they took out our \$30,000 money from the bank.

After the court permitted her to not appear at the next hearing, Grandmother stated, again in English: "[p]lease I'm begging you -- I'm -- my son -- I'm -- I know my son is hundred percent -- he did not do anything. I -- I know -- . . . I - - I am a very --they -- they say come our house and pay [sic] for us," before the court cut her off.

Grandmother then filed a motion seeking discovery and permission to retain an expert. In it, Grandmother conceded R.K. should be permitted to see his grandparents on his own accord, considering his age and testimony; H.K. should see his grandparents at least once if and when he was comfortable; but asserted E.K. should be ordered to see his grandparents once every sixty days for four hours. Grandmother again requested the court find she met the

"threshold harm" standard, as applied to R.K. and E.K., based on their statements in their interviews, but not as to H.K. Mother filed a cross-motion requesting the court dismiss Grandmother's application for visitation with prejudice.

On June 28, 2022, the court held a virtual motion hearing via Zoom. The court questioned why Grandmother was so insistent on seeing the children in person. The court permitted each party to present their argument. At the conclusion, the court found it would not be in the best interests of R.K. or H.K. to see their grandparents until they are 18 years of age, and the criminal case has concluded.

With respect to E.K., the court found, although he would like to see his grandparents in person, based on his age and because he was not aware of the allegations and where the alleged abuse occurred, it would not be in his best interest to see them in person.

The court stated it:

f[ound,] b[y] clear and convincing evidence[,] that it will cause more harm to the children if they were to see the grandparents in person. So therefore, [this court is] denying the application. And this decision is based on the New Jersey statute 9:2-7.1, the testimony of the children, the young child not knowing the allegations but eventually will know, and it's certain to this [c]ourt, their credibility, what the grandmother blurted out on

the record in open court, knows about the allegations against her son yet believes the children are lying and without knowing further information, just assumes her son is innocent. And based on the . . . interviews of the children, [this court] was able to observe their facial expressions, their body language, what they stated. [This court] found them credible[,] and . . . found that they are healthy young children, intelligent, and confident and this court did not see that they were subject to any harm . . . by not seeing . . . their paternal grandparents [in-person].

In its subsequent written statement of reasons, it ruled:

This [c]ourt finds pursuant to N.J.S.A. 9:2-7.1 there is clear and convincing evidence, (although above the standard of preponderance of the evidence as referenced in the [s]tatute), of irreparable harm to the children if they were to have any further in-person visitation with Plaintiff [Grandmother]. Therefore, the [c]ourt hereby denies Plaintiff's request for in-person grandparent visitation with the children

Plaintiff shall have Facetime or WhatsApp video calls with the children on the 1st, 3rd, and 4th Sunday of each month from 9pm to 9:30pm commencing July 3, 2022. If any of the children feel uncomfortable with the conversation, they may terminate the call for that session. If any of the parties are not available on the designated day or time of a scheduled call, Plaintiff and Defendant [Mother] shall communicate via text and agree to a makeup video call. No discussion of the pending criminal investigation is permitted on any phone or video call with the children. None of the parties shall alienate the children from the other parties. None of the parties shall make disparaging comments to or in front of the children regarding the other parties. Counsel may submit certifications of attorney services

for the [c]ourt to consider not later than July 15, 2022. Failure to strictly comply with the terms of this [o]rder shall result in [c]ourt-ordered sanctions, which shall include, but not be limited to, a change in custody, loss of parenting time, monetary sanctions, suspension of driver's license, a bench warrant to issue for the non-compliant party, and a term of incarceration.

Mother subsequently submitted a certification of attorney services, which Grandmother opposed. After review, the court granted, in part, Mother's request for counsel fees, awarding \$39, 951.50.

This appeal followed.

II.

Our review of Family Part orders is limited. Cesare v. Cesare, 154 N.J. 394, 411 (1998). Family Part orders are afforded deference in recognition of "the court's special jurisdiction and expertise in family matters." Id. at 413. Therefore, "findings by the trial court are binding on appeal when supported by adequate, substantial, credible evidence." Id. at 411-12. We will disturb the trial court's factual findings and conclusions only where they "are so 'clearly mistaken' or 'wide of the mark'" that a denial of justice would result. N.J. Div. of Youth & Fam. Servs. v. E.P., 196 N.J. 88, 104 (2008) (quoting N.J. Div. of Youth & Fam. Servs. v. G.L., 191 N.J. 596, 605 (2007)). The trial court's interpretations of the law and legal conclusions, however, are not entitled to

deference and are reviewed de novo. Thieme v. Aucoin-Thieme, 227 N.J. 269, 283 (2016).

Grandparent Visitation

The Grandparent and Sibling Visitation Statute (GVS) "confers on a child's grandparent . . . standing to file an action for an order compelling visitation," N.J.S.A. 9:2-7.1; Major v. Maguire, 224 N.J. 1, 13 (2016), and "provides the framework for grandparent . . . visitation when visitation is proven to be 'in the best interests of the child,'" N.J. Div. of Youth & Fam. Servs. v. S.S., 187 N.J. 556, 562 (2006) (quoting N.J.S.A. 9:2-7.1(a)). Although the GVS permits the court to order visitation with a grandparent, we have recognized "by virtue of a fit parent's fundamental due process right to raise his or her children, the parent is entitled to a presumption that he or she acts in the best interests of the child, and that the parent's determination whether to permit visitation is entitled to 'special weight.'" Major, 224 N.J. at 15 (quoting Troxel v. Granville, 530 U.S. 57, 67-69 (2000)).

A "grandparent seeking . . . visitation [under the GVS] must prove by a preponderance of the evidence that denial of [the visitation] would result in harm to the child." Id. at 7 (citing Moriarty v. Bradt, 177 N.J. 84, 117-18 (2003)). "Substantively, it is a 'heavy burden.'" Slawinski v. Nicholas, 448 N.J. Super.

25, 34 (App. Div. 2016) (quoting Major, 224 N.J. at 18). Only "[i]f . . . the potential for harm has been shown [can] the presumption in favor of parental decision making . . . be deemed overcome." Id. at 33 (quoting Moriarty, 177 N.J. at 117). Thus, the grandparent must make "a clear and specific allegation of concrete harm to the children." Daniels v. Daniels, 381 N.J. Super. 286, 294 (App. Div. 2005).

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

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

[P]roof of harm involves a greater showing than simply the best interests of the child. [Moriarty], 177 N.J. at

116 (stating that a dispute between a "fit custodial parent and the child's grandparent is not a contest between equals[,] consequently "the best interest standard, which is the tiebreaker between fit parents, is inapplicable"). . . . The harm to the grandchild must be "a particular identifiable harm, specific to the child." Mizrahi v. Cannon, 375 N.J. Super. 221, 234 (App. Div. 2005). It "generally rests on the existence of an unusually close relationship between the grandparent and the child, or on traumatic circumstances such as a parent's death." [Daniels, 381 N.J. Super. at 294]. By contrast, missed opportunities for creating "happy memories" do not suffice. Mizrahi, 375 N.J. Super. at 234. Only after the grandparent vaults the proof-of-harm threshold will the court apply a best-interests analysis to resolve disputes over visitation details. Moriarty, 177 N.J. at 117.

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

Accordingly, if a grandparent meets the threshold showing of harm, the best interests standard applies and a trial court should consider the statutory factors pursuant to N.J.S.A. 9:2-7.1(b) to determine whether permitting visitation would be in the child's best interests.⁵ Moriarty, 177 N.J. at 117.

⁵ Those statutory factors include:

- (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;

Nevertheless, "the trial court should not hesitate to dismiss an action without conducting a full trial if the grandparents cannot sustain their burden to make the required showing of harm." Major, 224 N.J. at 25. As we have cautioned, "[t]he process of discovery can impose expense, inconvenience and trauma" and therefore "[a]bsent special circumstances, parents who decide to limit or even preclude grandparent visitation should not be faced with court-ordered psychological examinations and other intrusive measures at the grandparents' behest." Daniels, 381 N.J. Super. at 297.

Guided by these standards, we disagree with Grandmother's contentions the trial court: 1) failed to make sufficient findings as to the children's best

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- (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.

interests; 2) mistakenly failed to characterize this matter as complex; 3) deprived her of due process in failing to order discovery, appoint a guardian ad litem, or allow the appointment of an expert; and 4) erred in denying her in-person grandparent visitation. Grandmother's arguments are belied by the record, which demonstrates the trial court found a risk of actual harm to the children if Grandmother were allowed in-person visitation, not a risk the children would be harmed if visitation were denied. Given that Father was, initially, the person who sought grandparent visitation in his cross-motion after his arrest, the court was correct to question Grandmother's insistence upon in-person visitation and was correctly concerned with Grandmother's ability to unduly influence the children in her son's pending criminal case.

The trial court's finding that in-person visitation would create a risk of harm to the children was based upon the children's interviews, the pending sexual abuse criminal case, and because the alleged abuse occurred in Grandmother's home while she and the children's grandfather were present. Grandmother did not establish the threshold showing of harm to the children if grandparent visitation were denied. Despite the lack of threshold harm, the trial court still granted the grandparents video visitation of all three children. Moreover, Grandmother fails to demonstrate she is entitled to select the form of

visitation, even if she had established the threshold harm to the children. The method of visitation remains a matter of discretion with the trial court. Under these circumstances, we perceive no reason to disturb the trial court's June 30, 2022 order.

Counsel Fees

The decision to grant an award of counsel fees in a family action is within the discretion of the trial court and will not be disturbed absent a finding of an abuse of discretion. N.J.S.A. 2A:34-23; R. 5:3-5(c). A party in a family action moving to recover counsel fees must support their application by including "an affidavit of services addressing the factors enumerated by RPC 1.5(a) . . . [and] a recitation of other factors pertinent in the evaluation of the services rendered, the amount of the allowance applied for, and an itemization of disbursements for which reimbursement is sought." R. 4:42-9(b). Furthermore, the trial court, in exercising its discretion, must consider the factors enumerated in R. 5:3-5(c). N.J.S.A. 2A:34-23; Mani v. Mani, 183 N.J. 70, 93-95 (2005).

R. 5:3-5(c) provides:

In determining the amount of the fee award, the court should consider, in addition to the information required to be submitted pursuant to R. 4:42-9, the following factors: (1) the financial circumstances of the parties; (2) the ability of the parties to pay their own fees or to contribute to the fees of the other party; (3) the

reasonableness and good faith of the positions advanced by the parties both during and prior to trial; (4) the extent of the fees incurred by both parties; (5) any fees previously awarded; (6) the amount of fees previously paid to counsel by each party; (7) the results obtained; (8) the degree to which fees were incurred to enforce existing orders or to compel discovery; and (9) any other factor bearing on the fairness of an award.

However, "'where one party acts in bad faith, the relative economic position of the parties has little relevance' because the purpose of the award is to protect the innocent party from unnecessary costs and to punish the guilty party." Yueh v. Yueh, 329 N.J. Super. 447, 461 (App. Div. 2000) (quoting Kelly v. Kelly, 262 N.J. Super. 303, 307 (Ch. Div. 1992)).

In the court's statement of reasons, it determined "Defendant's counsel fees [were] reasonable, the parties' financial circumstances [were] similar, no fees were previously awarded in the instant matter, and Defendant was ultimately successful in her opposition to Plaintiff's request for in-person parenting time with the children." The court questioned Grandmother's good faith and found her insistence upon in-person visitation was to unduly influence the children concerning their father's criminal case. The court did not grant fees incurred by the firm that previously represented Mother because "there was no

submission from the previous counsel regarding those fees incurred." The court awarded defendant \$39,951.50.

Grandmother argues the trial court abused its discretion in awarding Mother \$39,951.50 in counsel fees as it did not have adequate financial information because neither party submitted a case information statement, nor did they exchange financial discovery. Mother argues the trial court did not abuse its discretion in awarding her counsel fees because its analysis was appropriate pursuant to R. 5:3-5(c), R. 4:42-9(a), RPC 1.5(a), and Grandmother's bad faith.

Despite not having financial documents, the trial court "was aware of Plaintiff's advanced age and that Plaintiff and her husband live off of Social Security benefits." Mother argues "it was reasonable for the trial court to infer Plaintiff had a substantial asset base as Plaintiff was not working, allegedly relying on Social Security Benefits, and was able to retain a prominent national law firm to represent her in connection with her request for grandparent visitation." The trial court agreed. Additionally, as the trial court noted, Grandmother failed to provide the court with any financial information regarding her ability to pay an award in her opposition to Mother's motion for fees.

The trial court did not abuse its discretion. Both parties were permitted to submit to the court certifications of attorney services and briefs. Mother provided the court with a certification of services and a detailed itemization of disbursements. Grandmother provided a certification of services but failed to detail her financial circumstances, to her own peril. Because the trial court based its award of counsel fees on the applicable factors, and not solely on bad faith, we affirm the award of attorney's fees.

Affirmed.

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



CLERK OF THE APPELLATE DIVISION