FAMLNWS 2024-37
Family Law Newsletters
September 30, 2024

— Franks & Zalev - This Week in Family Law

Aaron Franks & Michael Zalev

Contents

Grandparents Gone Wild

F.S. v. N.J. and T.S., 2024 CarswellOnt 5800 (C.J.) — Sherr J.

Kirshenblatt v. Kirshenblatt (2024), 3 R.F.L. (9th) 369 (Ont. S.C.J.) — Himel J.

Issues: Ontario — Grandparent Contact

F.S. and *Kirshenblatt* both involved requests by a grandparent for contact with a grandchild pursuant to s. 21(3) of the *Children's Law Reform Act*, R.S.O. 1990, c. C.12, which provides that "[a]ny person other than the parent of a child, including a grandparent, may apply to a court for a contact order with respect to the child."

As discussed further below, while the facts of *F.S.* were straightforward and the outcome fairly predictable based on the facts, the decision includes a comprehensive summary from Justice Sherr of the legal principles that apply to grandparent contact cases in Ontario, and a framework for dealing with grandparent contact cases. Justice Himel then applied that framework to decide what should happen on the far more complicated facts in *Kirshenblatt*.

Both cases also help illustrate the competing values that ultimately underlie grandparent contact cases: should we generally leave it up to parents to decide who their children spend time with; or do we use a more "paternalistic" approach where the court assumes that children will generally benefit from spending time with a grandparent — unless the parent can show that such contact would be harmful. As the Nova Scotia Court of Appeal explained in *Simmons v. Simmons* (2016), 89 R.F.L. (7th) 111 (N.S. C.A.) at para. 27:

> Broadly speaking, the cases appear to reflect **two quite different approaches** on the part of the courts, with significantly different implications, to the issue of grandparent access.
>
> The first approach, which has been characterized by some legal commentators as the "**Parental Autonomy**" approach, is based on the premise that **parents have the legal responsibility and the right to make decisions with respect to with whom their child will associate, how often, and in what circumstances.** Parents are traditionally, and continue legally, to be the arbiters of their child's "best interests". **In the absence of a finding of parental unfitness, or harm flowing from the lack of access, the state has no right to interfere with parents' proper decision making authority.**
>
> The second approach has been called the "**Pro Contact**" approach and tends to proceed from the premise that **generally, contact between a child and their grandparent is beneficial, and therefore access should not be denied unless it can be shown to be harmful. [emphasis** added]

[For further discussion of the various approaches to grandparent contact across Canada, including the "hybrid approach" that is favoured in B.C. (see e.g. *L.P. and D.P. v. C.C.* (2022), 69 R.F.L. (8th) 470 (B.C. Prov. Ct.) at paras. 28-29) that involves

a mix of both approaches, see our comment on *VW v. AT* (2022), 76 R.F.L. (8th) 255 (Alta. C.A.) in the October 10, 2022 (2022-37) edition of *TWFL*.]

F.S. also includes a list of the principles that apply when dealing with restraining Orders that counsel should keep handy for whenever you are dealing with a motion for that type of relief.

F.S. v. N.J. and T.S.

The mother and father started a relationship in 2016 when the mother was only 17-years-old. About a year into the relationship, the mother moved into the paternal grandmother's home.

A few months after the mother moved in with the grandmother, the father was arrested and charged with first-degree murder and three counts of attempted murder. He was denied bail, and was ultimately convicted and sentenced to life in prison with no possibility of parole for 25 years.

Shortly before the father was arrested, the mother became pregnant with his child. She gave birth in March 2018. She initially continued living with the grandmother, but moved into her own accommodations in February 2019.

The grandmother had very limited contact with the child between February 2019 and July 2022, and no contact at all after that as the mother was no longer willing to let the grandmother see the child.

In May 2023, the grandmother commenced an Application against the mother for contact with the child.

As he so often does, Justice Sherr started his analysis with a comprehensive discussion of the applicable legal principles. His complete analysis can be found in paras. 68-79 of his decision, but to briefly summarize:

> 1. A parent's decision about whether to allow a grandparent access to a child is presumptively entitled to deference. **[*Chapman v. Chapman* (2001), 15 R.F.L. (5th) 46 (Ont. C.A.) at para. 21]**
>
> 2. A two-step framework applies when a court is considering whether to grant access to a grandparent against a parent's wishes. **[*B.F. v. A.N.*, 2024 CarswellOnt 1506 (C.A.) at footnote 3]**
>
> 3. At the first stage of the test, the court should generally defer to a parent's decision unless all three of the following questions are answered in the affirmative:
>
> > a. Does a positive grandparent-grandchild relationship already exist? This requires "more than an occasional pleasant experience with the child." Rather, there must be a "substantial pre-existing relationship" that "consist[s] of a close bond with strong emotional ties, deserving of preservation[.]" The relationship must also "be a constructive one for the child in the sense that it is worth preserving", and be "capable of preservation", having regard to the nature of the relationship between the adults. **[*Torabi v. Patterson* (2016), 79 R.F.L. (7th) 228 (Ont. C.J.) at para. 74 and *Capone v. Pirri*, 2018 CarswellOnt 19163 (S.C.J.) at paras. 15-16]**
> >
> > b. Does the parent's decision imperil this relationship?
> >
> > c. Has the parent acted arbitrarily? This means that the parent is making decisions about grandparent-child contact based on considerations other than the child's best interests. **[*Giansante v. Di Chiara*, 2005 CarswellOnt 3290 (S.C.J.) at para. 18]**
>
> 4. In exceptional circumstances where a child has lost a parent, whether because of death, imprisonment, or other cause, "the existence of a strong pre-existing relationship may not be necessary when the relative(s) of the lost parent applies for access." **[*Torabi v. Patterson* (2016), 79 R.F.L. (7th) 228 (Ont. C.J.) at para. 74 and *Ninkovic v. Utjesinovic* (2019), 23 R.F.L. (8th) 172 (Ont. S.C.J.) at paras. 72-74]**

> 5. At the second stage, if the court decides not to defer to the parent's decision, it should then consider the child's best interests, bearing in mind all necessary factors, including:
>
> a. The nature and strength of the child's relationship with the grandparent;
>
> b. The history of the child's care;
>
> c. The child's needs, including any special needs;
>
> d. The grandparent's willingness and ability to meet the child's needs;
>
> e. The grandparent's willingness and ability to cooperate with the child's parent and other caregivers;
>
> f. The child's cultural, linguistic, and religious upbringing; and
>
> g. Any criminal proceeding, order, condition, or measure relevant to the safety of the child.—**[*B.F. v. A.N.*, 2024 CarswellOnt 1506 (C.A.) at para. 17]**
>
> 6. At the second stage, it is also important to consider "the extent to which [grandparent contact] would cause anxiety and stress for the parent, which in turn could have a deleterious impact on the child", and "whether an access order would destabilize the family unit." **[*Ninkovic v. Utjesinovic* (2019), 23 R.F.L. (8th) 172 (Ont. S.C.J.) at paras. 72-74]**

In *F.S.*, at the first stage of the test, Justice Sherr found that although the grandmother had a positive relationship during the first 16 months of the child's life, she only saw the child nine times from July 2019 to July 2022, at which point she stopped seeing the child entirely. Furthermore, the evidence showed that by July 2022, when the mother stopped letting the grandmother see the child, the child "no longer had a strong bond or strong emotional ties with the paternal grandmother."

Justice Sherr was also satisfied that the mother's decision to cut off contact between the child and the grandmother had been reasonable, and thus not arbitrary. Among other things, the mother had legitimate safety concerns about the grandmother's living arrangements and the criminal histories of various other members of her family, and because the grandmother minimized and refused to acknowledge the mother's legitimate concerns. There was also a significant power imbalance between the mother and the paternal grandmother, and the grandmother refused to acknowledge that she bore any responsibility for the problems in her relationship with the mother or her role in not seeing the child.

Even though the grandmother's Application for contact failed at the first stage of the test, Justice Sherr went on to consider the second stage, and ultimately concluded that because of the problems with the grandmother he had identified in his analysis at stage one, it would not be in the child's best interests to grant the grandmother's request for a contact Order.

The mother also asked the court to make an Order restraining the grandmother from contacting her further pursuant to s. 35 of the *Children's Law Reform Act*, which permits a court to "make an interim or final restraining order against any person if the applicant has reasonable grounds to fear for his or her own safety or for the safety of any child in his or her lawful custody."

To decide the issue, Justice Sherr turned to his earlier decision in *G.P. v. R.P.* (2023), 92 R.F.L. (8th) 45 (Ont. C.J.), where he set out the following list of principles that apply when dealing with restraining orders:

> [22] The legal principles for the court to apply in determining whether to grant a restraining order are as follows:
>
> a) **Restraining orders are serious and should not be ordered unless a clear case has been made out.** See: *Ciffolillo v. Niewelglowski*, 2007 ONCJ 469.
>
> b) **Courts should not order restraining orders in borderline cases just to be cautious.** That ignores the test and the onus of proof. See: *A.H. v. M.T.*, 2023 ONSC 2365.

c) **A restraining order is serious, with criminal consequences if there is a breach.** It will also likely appear if prospective employers conduct a criminal record (CPIC) search. This could adversely affect a person's ability to work. It may affect a person's immigration status. See: *F.K. v. M.C.*, 2017 ONCJ 181.

d) **It is not sufficient to argue that there would be no harm in granting the order.** See: *Edwards v. Tronick-Wehring*, 2004 ONCJ 195.

e) **Courts should be hesitant to make the order simply because there was a similar order in place before that has now expired.** Orders expire. See: *A.H. v. M.T., supra*.

f) Before the court can grant a restraining order, **it must be satisfied that there are "reasonable grounds for the person to fear for his or her own safety or for the safety of their child"**. See: *McCall v. Res*, 2013 ONCJ 254.

g) **The test for a restraining order is both objective and subjective.** The legislation itself makes that clear, as an entirely subjective test would have no use for the words "reasonable grounds" as a qualifier to the fear(s) expressed by the requesting party. See: *A.H. v. M.T., supra; McGowan v. McGowan*, 2018 ONSC 5950, at paragraph 38. [Footnote 1 — The court notes that **there is jurisprudence the person's fear may be entirely subjective so long as it is legitimate.** See: *Fuda v. Fuda*, 2011 CarswellOnt 146 (Ont. SCJ); *McCall v. Res, supra*. A person's subjective fear can extend to both the person's physical safety and psychological safety. See: *Azimi v. Mirzaei*, 2010 CarswellOnt 4464 (Ont.S.C.).]

h) **The relief is discretionary.** While there are subjective and objective elements in the test, **more is required than an expression of concern. There must be evidence** as to specific events and a connection to the present situation. See: *Noriega v. Litke*, 2020 ONSC 2970; *S.S.L. v. M.A.B.*, 2022 ONSC 6326.

i) **It is not necessary for a respondent to have actually committed an act, gesture or words of harassment to justify a restraining order.** It is enough if an applicant has a legitimate fear of such acts being committed. **An applicant does not have to have an overwhelming fear that could be understood by almost everyone**; the standard for granting an order is not that elevated. See: *Fuda v. Fuda, supra*.

j) **A restraining order cannot be issued to forestall every perceived fear of insult or possible harm without compelling facts.** There can be fears of a personal or subjective nature, but they must be related to a respondent's actions or words. **A court must be able to connect or associate a respondent's actions or words with an applicant's fears.** See: *Fuda v. Fuda, supra*.

k) **A restraining order will be made where a person has demonstrated a lengthy period of harassment or irresponsible, impulsive behaviour with the objective of harassing or distressing a party.** There should be some persistence to the conduct complained of and a reasonable expectation that it will continue without court involvement. See: *Purewal v. Purewal*, 2004 ONCJ 195.

l) Courts should have regard for the passage of time. **Events that once triggered a temporary restraining order may not be so compelling on the issue of a permanent order.** See: *D.C. v. M.T.C.*, 2015 ONCJ 242; *Jumale v. Mahamed*, 2022 ONSC 566.

m) **In borderline cases, the court must consider what other protections may be available** if a restraining order is not granted. See: *D.C. v. M.T.C.*, *supra; M.H.S. v. M.R.*, 2021 ONCJ 665.

n) **It is appropriate, in borderline cases, to consider the balancing prejudice to the respondent if the restraining order is granted.** See: *D.C. v. M.T.C., supra; M.H.S. v. M.R., supra*.

o) **A court is not precluded from making a final restraining order if a party has complied with a temporary order** under section 28 of the Act. On a temporary motion, the court does not have the benefit of the fulsome record it has at trial. Cross-examination at trial can provide valuable information in the court's risk assessment. Further, **the court should be**

> **alert to the fact that parties may improve their behaviour when the eyes of the court are on them. This might not continue once the case ends.** See: *F.K. v. M.C., supra.* [**emphasis** added]

Even though the mother was subjectively afraid of the grandmother, and although the grandmother had sent some harsh and argumentative text messages to the mother several years earlier, Justice Sherr was not satisfied that anything the grandmother had done gave rise to reasonable grounds for the mother to fear for her own safety, particularly since the grandmother had not communicated with her at all since July 2022.

As a result, both the grandmother's request for a contact Order and the mother's request for a restraining Order were dismissed.

Kirshenblatt v. Kirshenblatt

Kirshenblatt also involved an Application by the paternal grandparents for contact with their grandchildren. However, the underlying facts were *very* different.

The husband and wife in *Kirshenblatt* were married in 2008. They had a difficult relationship with the husband's parents, who provided them with significant financial support, but who also made what the husband and wife felt were excessive demands for the husband's attention, and had difficulty setting and following boundaries. After speaking with a counsellor, the husband and wife eventually decided to largely disengage from the paternal family who then blamed the wife for damaging their relationship with the husband.

The husband and wife's two daughters were born in 2010 and 2014. The paternal grandparents had reasonable contact when the grandchildren were little. However, their contact decreased fairly quickly after the second grandchild was born, and by 2016 the grandparents were barely seeing them.

By 2017, the relationship between the grandparents and the parents had deteriorated to the point that they were largely communicating through lawyers. Unfortunately (but not surprisingly), the involvement of lawyers only inflamed an already difficult situation. And, although the parents permitted the grandparents to continue seeing the older child, they did not allow them to have any contact with the younger one.

Perhaps the parents could have handled the situation better than they did, but the grandparents' conduct turned what was already an incendiary situation into an all out scorched-earth war. For example, in November 2018, the grandfather wrote to the parents that when the children were older, "they will receive couriered, hand-delivered copies of all correspondence to ensure the truth is revealed", and "will govern for themselves whether they were robbed of loving and doting grandparents and used as pawns and leverage in an unjustified war waged." He also suggested that his son was a "victim of psychological abuse" by the daughter-in-law. (Paging Mr. Carnegie . . . Paging Mr. Dale Carnegie . . .)

In February 2019, the grandparents commenced an Application against the parents for regular contact with their grandchildren.

Despite the involvement of multiple professionals and judges, including a lawyer for the children appointed by the OCL and a comprehensive custody and access assessment from one of the leading assessors in Ontario, the parties could not find a way to resolve the matter.

The trial started before Justice Himel in May 2024 and lasted 12 days. How it could have taken five years to get the case to trial, or why the parties needed or were permitted 12 days of court time in one of the busiest family court sites in the country to argue about grandparent contact, is a rant for another day.

The grandparents requested an Order for contact with both children for at least six hours a month, an Order for "reunification counselling" between the grandparents and the children, and an Order permitting the grandparents to attend the children's extra curricular activities.

The parents took the position that it should be for them to decide whether and when the younger child saw the grandparents. They also opposed the request for court ordered therapy. Surprisingly, however, they conceded that the court should make a

contact Order for the older child, although they asked that it be limited to three hours a month instead of six as requested by the grandparents. As discussed further below, the parents' willingness to consent to a contact Order with the older child appears to have had a significant impact on the outcome with respect to the younger child.

Applying the first stage of the test discussed from *F.S.* vis-à-vis the older child, Justice Himel found that there was a pre-existing positive relationship between the child and the grandparents, and that this relationship was being imperilled by the conduct of both the parents *and* the grandparents. However, she also found that the parents had not acted arbitrarily by limiting contact and had instead used their best judgment to protect the child as they saw fit, and had taken the child's views and preferences into account. Accordingly, there was no basis to interfere with the parents' decision in respect of contact between the grandparents and the older child, and Justice Himel simply accepted their request for the Order to provide for three hours of contact once a month (with additional contact as agreed upon from time to time).

The situation was more complicated for the younger child. Since she had never really established a relationship with the grandparents, and had only had minimal contact with them over the years, it could not be said that she had a pre-existing positive relationship with them. Accordingly, even though Justice Himel found that the parents (and the grandparents) had imperilled the relationship and had acted arbitrarily by facilitating a relationship between the grandparents and the older child, based on a strict reading of stage one, the grandparents' claim for contact should have failed due to the absence of a positive pre-existing relationship.

But *not so fast*, said Justice Himel, because there can be (or at least ought to be) an exception where, as in this case, two children in the same family are being treated differently:

> [199] The three-part test set out in *Giansante v. DiChiara*, was recently endorsed by the Ontario Court of Appeal. However, **I do not believe that it was intended to be determinative of all cases.** On the contrary, while courts generally defer to the parents and it is usually not up to a court to create a positive relationship, there **may be exceptions to the "rule", as articulated by Nelson J.** He states:
>
> > I do not take this to mean that there will never be situations where a court might intervene despite the absence of a pre-existing positive grandparent-grandchild relationship. For example, **these reasons do not presume to address what might happen when a grandparent never had an opportunity to establish a relationship with a grandchild. In such a case the absence of a pre-existing positive relationship might not be a bar to an access order.**
>
> [200] **The facts of this case are unique, and not yet considered in the caselaw. Two children in the same family are being treated differently vis-à-vis their relationships with their grandparents.**
>
> . . . . .
>
> [209] I am compelled to consider the relevant factors set out in the *CLRA*, on the facts of this case. **To refuse to explore L.'s best interests simply because the grandparents failed to meet the three-part test, when a contact order is being made for her sister E. on consent, is not child-focused.**
>
> [210] **I decline to defer to the parents' position** in respect of contact between the grandparents and L. [**emphasis** added]

After considering the evidence, Justice Himel concluded that despite the absence of a positive pre-existing relationship, it would be in the younger child's best interests to join her sister when she spent the three hours a month with the grandparents that the parents had already agreed to.

However, she rejected the grandparents' request for reunification counselling, as she was not persuaded that this was "one of the exceedingly rare cases where it is appropriate to order counselling over the parents' objections." Instead, she left it up to the parents to decide whether counselling would be appropriate, and what form that counselling ought to take.

We wonder whether the result would have been different had the parents, instead of agreeing to an Order for three hours a month with the older child, simply opposed any order being made on the basis that they were entirely capable of deciding whether and

when their children should have contact with their grandparents? This would not have prevented them from telling the court that, as long as the grandparents behaved themselves, they planned to arrange for the children to have at least *some* regular contact with the grandparent; but it might have made it more difficult for the court to justify an Order being made for the younger child (since, absent the parents' consent, there would have been no basis to make an Order for the older child).

In any event, perhaps going through the trial and reading Justice Himel's thoughtful decision will help these parties repair their fractured relationships. Meh . . . probably not.