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Appeals Court Further Limits Grandparent Visitation In Massachusetts



The U.S. Supreme Court has held that parents have a fundamental right to raise their child without interference from the state or third parties without a compelling reason. The fundamental rights of biological and adoptive parents can sometimes conflict with the limited rights afforded to grandparents, particularly when parents are unmarried, separated or **divorced**. Conflicts between parents and grandparents often play out when one parent is deceased, incarcerated, or deemed **unfit to care for a child**, leaving the other parent solely responsible for the child's care and upbringing. In these scenarios, the single parent has broad authority to prevent grandparents from

having contact with the child without the parent's consent.

When such a conflict arises, Massachusetts courts allows grandparents to file a Petition for Grandparent Visitation to seek an order allowing contact between the grandparent(s) and child despite the objection of one or both parents. However, grandparents **often struggle to obtain visitation in Massachusetts** due to the constitutional limits faced by Probate Court judges in such cases. A recent Appeals Court ruling, **Frazier v. Frazier (2019)**, affecting the pleading requirements for grandparent visitation petitions, has made it even more difficult for grandparents seeking visitation rights.

Grandparents Have Always Struggled With Visitation Rights in Massachusetts

Grandparent visitation cases sometimes arise in divorce cases or **child custody** disputes between **unmarried parents**. Typically, grandparent disputes do not occur when (a.) both parents have substantial parenting time and (b.) at least one parent agrees to allow the children to see the grandparent(s) during that parent's custodial time. However, when one parent controls all or nearly all of the

custodial rights, that parent may decline to allow contact between the child and one or more grandparent. This can often be abrupt and hurtful, but it is often seen as that parent's right.

In Massachusetts, probate courts have long recognized that "the interest of parents in the care, custody, and control of their children... is perhaps the oldest of the fundamental liberty interests recognized." *Martinez v. Martinez-Cintrón*, 93 Mass. App. Ct. 202, 205 (2018). In some cases, however, parental rights manifest through one or both parents pushing away the child's grandparents, despite a previous relationship between the child and grandparent(s). The law generally favors the parent's desire to exclude the grandparents, rather than with the grandparents' wish to see their grandchildren, when such disputes reach the Probate and Family Courts.

Meeting Evidentiary Burden is Difficult in Grandparent Visitation Cases

In order to override the wishes of the parent, a grandparent must file a petition seeking visitation rights under *G. L. c. 119, s 39D*. The petition is not a simple request, where it must overcome the presumption that a parent's decision to exclude the grandparents must be respected. Under the law, grandparents can only overcome the presumption by showing that there already exist a substantial, almost parent-like relationship with the grandchild and that "the failure to grant visitation will cause the child significant harm by adversely affecting the child's health, safety, or welfare." *Blixt v. Blixt*, 437 Mass. 649, 658 (2002).

Meeting this high burden is significantly more difficult than most grandparents realize. Courts have regularly refused grandparent visitation rights when there was already a strong and regular relationship between the child and grandparent. In one case, the grandparent babysat the children regularly, saw them several times per month, and took them on camping trips and to the fair. *Dearborn v. Deausault*, 61 Mass. App. Ct. 234 (2004). Meeting the standard often required the grandparent to demonstrate that he or she acted as the child's "*de facto* parent", strong evidence is required in demonstrating that the grandparent acted as/or like a parent or guardian for an extended period of time, living and caring for the child as if he or she was the child's parent.

Moreover, in order to protect parents from a court proceeding which could, itself, have a negative impact on the parent's relationship with their child, grandparents are required to provide detailed and verified factual allegations in support of their petition for visitation with an affidavit outlining the same. The law provides that a

grandparent should only receive a hearing if his or her sworn statement, if true, provides sufficient facts to meet the high burden.

Heightened Pleading Requirements Trickle Down to Grandparent Visitation Cases

Grandparent visitation petitions recently became more difficult thanks to an Appeals Court case that raised the bar even higher for grandparents' petitions and affidavits.

For decades, Massachusetts employed a lenient legal standard regarding the sufficiency of legal pleadings. For decades, pleadings were deemed sufficient “unless it appears beyond a doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.” *Nader v. Citron*, 372 Mass. 96, 98 (1977). This low standard allowed many vaguely worded pleadings to be considered by the court, despite thin factual allegations. In 2007, the U.S. Supreme Court heightened that pleading requirement, forcing them to include “factual allegations plausibly suggesting (not merely consistent with) an entitlement to relief.” *Bell Atlantic Corp., v. Twombly*, 550 U.S. 544, 577 (2007). The Supreme Judicial Court of Massachusetts adopted this pleading requirement in 2008. Now the Massachusetts Appeals Court has adopted it for grandparent visitation requests, further heightening the already difficult burden faced by grandparents in such cases.

The Appeals Court holding in *Frazier v. Frazier* (2019) provides that grandparents requesting visitation rights have to (1) demonstrate their significant bond with the child; (2) demonstrate that the child will suffer “significant harm” if their petition is denied; and, (3) they have to include factual allegations in the petition itself, to plausibly support this claim. Applying the more stringent pleadings analysis, the Appeals Court held that the grandparents did not meet their burden:

[T]he paternal grandparents allegations do not suggest the type of relationship with the children plausibly suggesting a right to relief — that is, nothing in the allegations plausibly suggests that the children will be significantly harmed unless the mother's right to determine what is in her children's best interest is overridden.

...

The relationship, as alleged in the present petition ... consists of shared meals, visits, vacations, and holidays and includes providing access to

extracurricular activities at the paternal grandparents' clubs. While apparently nurturing and enriching, the relationship is not “such as de facto parents or other relationships of close bonding, where significant harm may be readily inferred from and is inherent in the disruption of that relationship.” ... Such a relationship is not enough to meet the showing of a “significant” preexisting relationship such that “significant harm to the children may be inferred from disruption alone.” ... As such, the petition fails to set forth factual allegations “plausibly suggesting” a right to relief for any claim ...

If obtaining grandparent visitation was difficult before, the increased focus on the pleadings by the Appeals Court will make the process even more of an uphill struggle. As is often the case in such decisions, the Appeals Court expressed sympathy for the grandparent’s position while denying her claim:

We are not unsympathetic to the paternal grandmother's desire to maintain a relationship with the children. With regard to her contention that, because she has a preexisting relationship with the children, she is entitled to an evidentiary hearing, however, our analysis must be guided by “[t]he liberty interest at issue in this case — the interest of parents in the care, custody, and control of their children — [which] is perhaps the oldest of the fundamental liberty interests recognized by this Court”.

In short, the decision encourages Probate Court judges to dismiss grandparent visitation petitions early in the litigation process, unless the grandparent can credibly layout a strong case from the outset.



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Guardianship Offers Alternate Means for Some Grandparents

Although Massachusetts places a very high burden on grandparents seeking visitation over the objection of fit parents, such conflicts often arise in situations in which the fitness of one or both parents might be questioned. In those instances, grandparents often find that filing a Petition for [Guardianship of a Minor](#) presents the grandparent with far more robust grounds compared to the grandparent visitation statute. A guardianship petition is not appropriate in every situation – courts generally only grant guardianship when there are questions about a parent’s fitness – but the deck is not stacked against grandparents in guardianship proceedings the way it often is in visitation proceedings.

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