

**SUPREME COURT - STATE OF NEW YORK**  
**I.A.S. PART 19- SUFFOLK COUNTY**

***P R E S E N T:***

Hon. SANDRA L. SGROI  
Justice of the Supreme Court

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E.S.,

Petitioner,

- against -

P.D.,

Respondent.

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***DECISION AFTER HEARING***

Index No.

Petitioner's Atty:

Thomas K. Campagna, Esq.  
4949 Express Drive North  
Ronkonkoma, NY 11779

Respondent's Atty:

Philip J. Castrovinci, PC  
12 Bank Ave.  
Smithtown, NY 11787

Law Guardian:

Robert D. Gallo, Esq.  
622 Hawkins Ave., Suite 2  
Ronkonkoma, NY 11779

***PROCEDURAL HISTORY***

On January 2, 2003, petitioner, E.S., commenced this proceeding pursuant to Domestic Relations Law §72 and Family Court Act §651 for an order granting reasonable visitation rights with her grandchild, C.D., and other related relief. Shortly thereafter, on February 6, 2003, respondent moved by order to show cause for an order directing petitioner to stay away and refrain from communicating with C.D., and to pay the fees of any law guardian and forensic

evaluator appointed by the Court in connection with the proceeding. Based upon the allegations in the supporting affidavit, the Court directed petitioner to stay away and to refrain from communicating with C.D. until the return date of the motion.

On March 5, 2003, upon consent of the parties' attorneys, the Court appointed Robert D. Gallo, Esq. as Law Guardian for the infant child and directed that petitioner pay any of his fees, with such expense subject to reapportionment at trial. Approximately two weeks later, the parties and the Law Guardian entered into an "Interim Supervised Visitation Stipulation," which was so-ordered by the Court on March 20, 2003. The stipulation states, among other things, that petitioner is entitled to participate in supervised visitation with C.D. two times per month for a period of ten weeks with an agreed upon evaluator and supervisor, Matthew Campbell. It further states that prior to the next scheduled Court appearance, June 2, 2003, the evaluator/supervisor would provide an interim report to the Court. At the next scheduled conference, the interim report was discussed and an agreement was reached regarding interim visitation.

On July 14, 2003, the parties entered into a temporary stipulation in open court, on the record, regarding visitation. This stipulation provides, among other things, that petitioner will have visitation with C.D. every other week on a temporary basis as follows: commencing July 19, 2003, petitioner will enjoy visitation with C.D. every fourth Saturday or Sunday at her home in East Hampton, New York from 12:00 p.m. until 5:00 p.m. Said visitation will be supervised either by respondent's mother or sister or, if both his mother and sister are unavailable, then by respondent. Further, the stipulation provides that commencing the week of August 2, 2003, petitioner will have visitation with C.D. every fourth Saturday or Sunday at the Manhattan home of respondent's mother or sister from 12:00 p.m. until 5:00 p.m. Said visitation will be supervised by respondent's mother or sister. In the event neither his mother nor sister is available, the visitation will be supervised by respondent and will occur at his home in Huntington, rather than in Manhattan. Further, the parties agreed that respondent would make every effort to allow petitioner and C.D. to spend as much time together outside of his presence as is reasonably possible. Mr. Gallo stated on the record that he believed such stipulation was in the best interest of C.D.

As the parties' affidavits contained sharply conflicting allegations of fact regarding the nature of the relationship between petitioner and the child, the matter was set down for a hearing. The hearing commenced on September 12, 2003, and continued intermittently over a period of several months. Both parties testified at the hearing. Respondent also presented eight witnesses in support of his application for an order directing petitioner to stay away from the child.

During the course of the hearing, on January 9, 2004, petitioner made an application for an order granting unsupervised visitation. Although the Law Guardian joined in the application, respondent vigorously opposed it on the ground that the entire case had not yet been heard and that the court could not modify the existing stipulation between the parties. The Court, then, directed the Law Guardian to meet with C.D. prior to the next scheduled hearing date to ascertain the child's wishes and desires with respect to visitation with E.S. On January 16, 2004, the hearing was adjourned as the parties were engaged in negotiations to settle the matter.

On January 20, 2004, testimony resumed after the parties' attorneys advised the Court that the case had not been resolved. At the end of the day, petitioner renewed her application for unsupervised weekend visitation with C.D. Respondent, a professor of law and a member of the New York Bar, was granted permission to argue on his own behalf against the application. After a lengthy discourse, the Court asked for a recommendation from the Law Guardian, who had met with C.D. at the Court's direction. Mr. Gallo recommended that unsupervised weekend visitation commence the upcoming weekend. He further recommended that during said period of visitation, and until further order of the court, there be no contact between C.D. and J.S., petitioner's son. Petitioner indicated she would comply with that directive. The Court, then, granted petitioner's application to the extent that it ordered unsupervised visitation one weekend every four weeks commencing on January 23, 2004, on the condition that there be no contact between C.D. and J.S. during the visitation periods.

Respondent immediately proceeded to the Appellate Division in Brooklyn in an attempt to stay this Court's temporary visitation order. While in Brooklyn on January 23, 2004, the parties' attorneys, upon the consent of their clients, entered into a stipulation modifying the temporary visitation order. The parties agreed that petitioner would enjoy unsupervised visitation with C.D. on alternating Saturdays or Sundays from 12:00 p.m. to 6:00 p.m. and on alternating mid-week dinner visitation twice a month. They further agreed that petitioner would enjoy telephone contact with C.D. once a week. This modified visitation schedule continued until the hearing concluded on August 25, 2004. On that same day, the Court, pursuant to *Lincoln v. Lincoln*, 24 N.Y.2d 270, 299 N.Y.S.2d 842 (1969), conducted an in camera interview with C.D. in the presence of the Law Guardian. Both parties were permitted to submit potential questions for the child. Thereafter, on October 22, 2004, counsel for the parties and the Law Guardian submitted post-hearing briefs and recommendations on the issue of visitation.

### ***EVIDENCE PRESENTED AT THE HEARING***

Petitioner was called as a witness on her own case on the first day of the hearing. She testified that her daughter, A.D., had been married to respondent, and that A.D. and P.D. had one child together, C.D., born November 19, 1993. In June 1997, A.D. was diagnosed with breast cancer, which had metastasized in her spine. Petitioner testified that she was asked to leave her home in East Hampton and to move into A.D. and P.D.'s home in Huntington so that she could help care for A.D. and C.D. Petitioner agreed and moved into the D family home. It is undisputed that petitioner cared for A.D. during her illness. She also cleaned the house, shopped and cooked meals for all of the members of the household, and acted as a caregiver for C.D. when his mother's illness prevented her from caring for him. Tragically, A.D. passed away on March 17, 1998.

Upon A.D.'s death, respondent requested that petitioner remain in the home to help care for C.D. and to assist with the demands of the household. Petitioner testified that she agreed to continue living with respondent and C.D., and that the three of them functioned as a family for

nearly four years. Both parties agree that petitioner acted as a parent and caregiver to C.D. There was testimony that she prepared C.D. for school, put him to bed, read with him, helped him with his homework, cooked his meals and laundered his clothes. Petitioner drove C.D. to school, to appointments and to various activities, including gym class, karate class, bowling, soccer, Little League baseball, and swimming class. She arranged for and transported C.D. to play dates, and supervised play dates for C.D. at respondent's home. She took C.D. to the library and got him his own library card, and introduced him to the game of chess. She transported him to therapy sessions. Petitioner further testified that after A.D.'s death, respondent and C.D. spent entire summers with her at her home in East Hampton. As respondent's schedule required that he resume his teaching duties before the school year began for C.D., respondent would return to the Huntington home first. Petitioner and C.D., however, would continue to live at petitioner's East Hampton residence for an additional few weeks, and then return to respondent's residence prior to the commencement of C.D.'s school year.

Petitioner testified that she remained at respondent's home until February 24, 2002. On that day, according to petitioner, respondent suddenly demanded that she move out of the residence. Petitioner testified that she was surprised by respondent's demand and that she objected to his plan that she immediately pack her belongings and leave the home, because she wanted an opportunity to speak with C.D., who was playing at a friend's house, before she left. She testified that she and C.D. had developed an exceptionally close bond since her daughter's death, and that she did not want the child to come home from a play date and find her room empty and all of her belongings gone without having said goodbye. She testified that she was especially concerned about C.D. finding her room vacant, because it was the room in which her daughter had died. Petitioner testified that a confrontation with respondent ensued, resulting in the arrival of the police and petitioner's son and his family. She testified that she left the house with most of her belongings that same day, and that she was not permitted to see C.D. before she left.

Petitioner testified that after moving from the Huntington residence, respondent allowed her only limited and sporadic visitation with C.D. In fact, he refused to permit petitioner to have any contact with C.D. for the next eight weeks. Thereafter, respondent allowed petitioner to see C.D. only four times in five months. On one occasion, petitioner asked if she could come to the house to retrieve belongings she had forgotten to take with her the day she moved out. She testified that respondent allowed her to come to the residence when C.D. was in school, and that when she arrived she found her belongings outside in garbage bags. She testified that respondent would not allow her into the house until she asked to use the bathroom. She testified that respondent and C.D. met her at a Burger King restaurant that same day, but that respondent would not allow C.D. to sit next to her. Petitioner testified that respondent allowed two more visits at Burger King under the same conditions. She testified that at the third of such visits, C.D. demanded that she sit next to him and she did. During this visit, respondent permitted petitioner to come to visit with C.D. for an hour or two at his house.

Petitioner testified that she consulted with a family law attorney to ascertain her rights after respondent had advised her that she had none. She testified that the attorney, without her consent, called respondent in an attempt to resolve the matter. Petitioner testified that

respondent then withheld any visitation with C.D. for another eight weeks.

Thereafter, according to petitioner, respondent allowed limited visitation, but set rules as to what petitioner could or could not do with C.D. and almost always denied her any telephone contact with the child. She testified that respondent only allowed C.D. to make two calls to her since February of 2002. Petitioner, then, recounted an incident in December 2002, which prompted her decision to bring the instant application for regular visitation. Petitioner testified that she was scheduled to visit with C.D. on December 8 in Huntington. She testified that respondent called her and said C.D. was involved with work on the computer and that she would have to come later in the day. She testified that she called respondent at approximately 10:30 a.m. to see if she should begin the almost two hour drive to Huntington, and that he told her it was all right. However, when she arrived at the house, respondent came outside and told her he had left a message on her cell phone that it was not a good time for a visit. She testified that respondent told her that C.D. was still doing his work and that she could not come into the house to wait. Petitioner stated that although she advised him that she did not receive the message, respondent told her she would have to wait to see C.D. Petitioner testified that after waiting in her car for approximately 2½ hours, she asked respondent if he would allow her into the house to use the bathroom. She stated that respondent permitted her to use the bathroom, but also told her she had to go back outside again. Petitioner testified that about 30 minutes later, respondent allowed her to come back into the house, where she waited to visit with C.D. for yet another hour. Petitioner testified that C.D. finally was allowed to leave the house with her at 4:00 p.m. for a three-hour visit. She testified that this incident, together with the respondent's past efforts to prevent her from visiting with C.D., prompted her to commence the instant proceeding to establish her visitation rights.

When the parties were in court on November 18, petitioner advised the Court that she and C.D. shared a mutual birthday the next day, November 19. She testified that before 2002, the parties had always celebrated petitioner and C.D.'s birthdays together. She testified that since their dispute in February 2002, respondent had denied or severely limited her access to C.D. on the child's birthday, refusing to allow him to take two of her calls to wish him a happy birthday. When asked how she presently felt about respondent, petitioner testified that she had always been very close to him and that she had loved him like a son for the 15 years she had known him. She testified that despite all of the incidents that have occurred since 2002, she wanted respondent to be a part of her family again, and that she believed it would be "cruel and heartbreaking" to C.D. if his relationship with his mother's family was severed.

When asked to specify the visitation arrangement that she was seeking, petitioner stated that she would like to visit with C.D. at her home in East Hampton two weekends per month, from Friday afternoon to Sunday afternoon and for a week or two during the year, and that she would like C.D. to spend time with her son, his wife and their children during some of the visits. She requested that she be permitted to see C.D. during some of the Jewish holidays so that he has a tie to his parents' religion. She also requested that she be permitted to have telephone contact with C.D. and offered to provide him with a cell phone. More particularly, petitioner requested that she be permitted to call C.D. once a week, and that he be permitted to call her whenever he wishes. Lastly, petitioner requested some contact with C.D. on his birthday, either in person or

by telephone, and she offered to provide all required transportation to effectuate visits.

Respondent's attorney cross-examined petitioner extensively over a period of five days. Counsel inquired as to many subjects, including petitioner's health, her ability to see, hear and drive, her religious beliefs, and the history of her relationship with respondent. He also questioned petitioner regarding arguments or disagreements the parties had during the time they were living together in respondent's home. Petitioner testified that at times she and respondent would disagree about issues involving C.D., such as the food he should eat, a proper bedtime, tooth-brushing habits, and homework. While respondent's attorney attempted to characterize these differences as arguments, petitioner testified she regarded them merely as differences of opinion. She testified that although she believed respondent often was rigid and unbending when it came to rules affecting C.D., she did not feel anger toward respondent and did not want to be in charge of C.D. or the household.

Further, petitioner explained that she wanted the parties to have "normal relationship, so that C.D. could feel that he had a grandmother and he had a father, and there was no choice between them." She testified that the disputes to which respondent's counsel referred were not the "major part of my life" with respondent when the parties lived together. In addition, she testified that respondent seemed to become more angry with her after he stopped taking his anti-depressant and anxiety medications.

At the close of petitioner's case, respondent moved to dismiss petitioner's case. Respondent argued that claims brought pursuant to Domestic Relations Law §72 involved situations where grandparents were denied visitation. He asserted that Domestic Relations Law §72 was not applicable in the instant case, as petitioner had been enjoying visitation, and was merely dissatisfied with the restraints and controls respondent placed upon her visitation. Respondent argued that in *Troxel v Granville*, 530 US 57, 120 S Ct 2054 (2000), the Supreme Court of the United States ruled that the due process clause of the Constitution does not permit a state to infringe on a parent's fundamental right to make child rearing decisions simply because a state judge believes a better decision could be made. Additionally, respondent argued that the case should be dismissed because it represented a "back door" attempt by J.S., who has no standing under Domestic Relations Law §72, to obtain visitation with C.D. Both petitioner and the Law Guardian opposed respondent's application. The Court reserved decision on the motion.

Respondent then commenced his direct case by calling, Witness #1, who had been hired by A.D. and respondent to provide day care services for C.D. prior to A.D.'s illness. Witness #1 left her position with the D family after A.D. became ill and petitioner moved into the house to help care for her. She returned after A.D.'s death to provide some assistance to petitioner and respondent, and did so for approximately eight months after A.D. passed away. The crux of her testimony was that petitioner coddled C.D. too much after A.D.'s death and that she bought him too many toys and material things. On cross examination, Witness # 1 admitted to having been institutionalized for mental illness and to taking psychotropic drugs. She also admitted to working without reporting income. After being advised of the privilege against self incrimination, Witness #1 asserted her Fifth Amendment rights and refused to answer any

additional questions. The Court found this witness's testimony lacked any probative value.

Respondent called Witness #2, his stepmother, who testified that petitioner insisted upon sitting with C.D. at respondent's father's 90<sup>th</sup> birthday party, which forced her to have to re-arrange another person's seating. On cross examination, the witness acknowledged the close relationship between petitioner and C.D. and the extraordinary services petitioner provided C.D. and respondent upon A.D.'s death. Respondent next called Witness #3, petitioner's daughter in law and the wife of J. S., who was questioned regarding the relationship between the parties and her family and about a note purportedly passed to C.D. during a visit to East Hampton.

Respondent then called Witness #4, an attorney who had represented him in a civil matter brought against petitioner and J.S.. The purported reason for calling this witness was to establish that hostility existed between respondent and J. S. Next, respondent called his sister, as Witness #5. Witness #5 testified that she served as one of the designated supervisors during the stipulated periods of visitation. She testified that during a visit in East Hampton, she observed A. S. give a note to her daughter, E, and gesture that the note be given to C.D. She also testified that although petitioner, respondent and C.D. were like a family after A.D.'s death, the situation changed after a period of time. Witness #5 stated that petitioner would only talk to her about the pending litigation and that respondent no longer had feelings of affection for petitioner.

Respondent's next witness, Witness #6, was a practicing attorney, a former law student of respondent and worked as a babysitter for C.D. from September of 1999 to January 2002. Witness #6 testified that she was interviewed by both petitioner and respondent when she applied for the baby sitting job, and that the parties got along well at that time. She acknowledged that the parties and C.D. interacted as a family unit, and that a loving relationship existed between petitioner and C.D. Witness #6 testified that the relationship between petitioner and respondent then deteriorated, that the parties frequently argued in front of C.D. about rules imposed by respondent, and that petitioner made derogatory remarks about respondent. She also testified about allegations that petitioner served discarded food to respondent and discussed ways of killing him with respondent's former girlfriend. However, after she was cross-examined by petitioner's attorney and the Law Guardian, the Court concluded Witness #6 lacked credibility and that her testimony was beyond belief.

Respondent called his mother, Witness #7, to the stand. Witness #7's testimony went to the issue of respondent's rules regarding such things as bedtime, meals and homework. She testified that petitioner expressed her disagreement with respondent's rules, indicating they were too rigid, and that there was increasing tension between the parties prior to petitioner's departure in 2002. On cross examination, Witness #7 testified that she has a very close relationship with C.D. She also acknowledged the extremely loving relationship that existed between the parties and C.D., and that petitioner had acted as a parent to C.D. during the years immediately after A.D.'s death.

Respondent also called petitioner to the stand. She was questioned about C.D.'s diagnosis of Attention Deficit Hyperactivity Disorder (hereinafter ADHD) and his taking of Ritalin for such condition. Petitioner indicated that she did not believe C.D. suffered from

ADHD, that two doctors had said he did not have the condition, and that the diagnosis was made after she had left respondent's home. She also testified that she was aware that C.D. was taking medication. When questioned as to whether she was angry with respondent, petitioner answered that anger is a negative emotion which she tries not to harbor and that she wished to re-establish a relationship with respondent for the sake of C.D. On cross examination by her attorney, petitioner testified that during the many months of agreed upon visitation, respondent never advised petitioner of any of C.D.'s special needs, that he failed or refused to respond to her telephone inquiries on this subject, and that he has sent C.D. to be with her without any medication. She further testified that regardless of her personal feelings on the matter, if C.D. were to come to her for visitation with medication and instructions regarding its administration, she would ensure that he take his medication as prescribed. Additionally, petitioner testified that she wishes to speak to respondent regarding all matters affecting C.D., but that he refuses to do so.

Respondent then testified on his own behalf. He recounted that he and A.D. were married on July 12, 1992, that C.D. was born on November 19, 1993, and that A.D. passed away on March 17, 1998. Respondent testified that he is an Associate Professor of Law and has been working in the legal field for almost 22 years. He went on to describe the events of the morning of his wife's death. At the next scheduled appearance date, respondent called Witness #8, out of turn, to provide foundation testimony for the introduction into evidence of a neuropsychological evaluation on C.D. After the neuropsychological record was admitted into evidence, respondent returned to the witness stand. Respondent testified that as of June, 2004, C.D. was ten years of age and attended the fifth grade at the Long Island School for the Gifted, where he was tested and found to have an IQ of 146. He testified that C.D. had not done well during the first few years of school, and that he had taken the child to therapy sessions for depression following the death of A.D. Respondent testified that C.D. has difficulty concentrating and poor graphomotor skills, and was diagnosed as suffering from ADHD. He testified about the actions he has taken to assist C.D. with these issues, including retaining a special education teacher and involving him in physical therapy and athletic activities. Respondent also testified that C.D. was prescribed medication to treat the symptoms of ADHD, and that he believes the medication has helped C.D.'s concentration, organizational ability and overall mood.

Respondent further testified as to a series of events leading up to his demand that petitioner leave his home, and as to the events that occurred on February 24, 2002. Most of the details offered by respondent were similar to those offered by petitioner, including the fact that petitioner did not want to leave the house without saying good bye to C.D. and that she was too upset to drive herself to East Hampton. When questioned why he waited nearly five years before asking petitioner to leave his residence, respondent explained that he was depressed and panic-stricken when A.D. died, and that petitioner was very helpful in some ways. He also testified that as he "got it together a little bit more," he could see the "bad" things petitioner was doing, such as "competing for control over the household" and "more importantly, competing for control over C.D."

In addition, respondent testified as to a few incidents that occurred during the time the parties lived together that allegedly caused him to be concerned about C.D.'s physical safety.

Specifically, respondent testified as to an incident that occurred one winter when C.D. was between three and five years old. Respondent testified that petitioner allowed C.D. to play outside in the snow without gloves or mittens, and that the child later ran into the house with beet-red hands and shrieking in pain. The other incident occurred when the parties and C.D. were in East Hampton, again when C.D. was between three and five years old. Respondent testified that petitioner wanted to bring C.D. outside to see horses that had wandered away from a farm in the area and were standing on her property. Respondent testified that he believed this incident showed very poor judgment on the part of petitioner, since C.D. could have been harmed or “crushed” by the horses. Respondent also expressed concern regarding petitioner’s driving ability and her habit of leaving doors either open or unlocked.

Respondent testified that he did not allow petitioner to visit with C.D. for approximately seven weeks after she left his home. He testified that there were approximately 13 visits between April and December of 2002. With respect to the visit scheduled for December 8 described by petitioner, respondent concurred that he had C.D. remain in his room to work on a special education project, and that petitioner was forced to wait approximately 5 hours before respondent would permit an abbreviated visitation with C.D. Respondent testified that he objected to petitioner involving C.D. in their dispute. He testified that petitioner drove a wedge between he and C.D. by telling C.D. to keep certain things from him. When asked to describe his current relationship with petitioner, respondent described it as one of “complete and unremitting hostility.” He testified that he hates petitioner and refuses to communicate with her, and that his “blood boils” every time he speaks with her. He testified that he believes petitioner undermined his relationship with C.D., and that she threatens his ability to raise his child as he sees fit. He testified that he has prohibited petitioner from going onto his property to pick up or drop off C.D. Moreover, respondent testified that his hatred of petitioner has grown and evolved over time.

When questioned about an incident that allegedly occurred during the course of this proceeding in which he denied petitioner a scheduled dinner visitation because C.D. had to complete a school assignment, respondent testified that he sent an e-mail message to petitioner’s counsel that morning advising that petitioner should not appear that day. Petitioner did not receive the message, and when she arrived for the visit after a two-hour drive from East Hampton, respondent told her she could not see C.D. that day and would have to re-schedule the dinner for another time. Respondent admitted that he refused to allow petitioner to visit or to even speak with C.D., claiming that it would have been an unreasonable distraction for the child. In addition, respondent testified that he has concerns about J. S. being in the presence of C.D. In essence, respondent testified that he does not trust that J.S. will not physically hurt C.D. or take things away from the child. He also testified that he is concerned that J.S. will say derogatory things to C.D. about respondent, and that he is fearful about the way J.S. drives.

When asked to summarize his request to the Court, respondent stated that he is “absolutely, unalterably” opposed to any visitation or communication between petitioner and C.D. He again expressed his hatred of petitioner, J.S. and A.S., and alleged that his relationship with the S. family was dysfunctional. Respondent testified that he believes visitation between C.D. and the adult members of the S. family is not in C.D.’s best interest and that, as C.D.’s

father, he has the right to decide the people with whom his child will associate. He further stated that he does not believe it is important for C.D. to have relationships with the members of his deceased wife's family. Additionally, when questioned by the Law Guardian, respondent testified that should the Court prohibit any contact between petitioner and C.D., he believes it will have a positive impact upon C.D.

On rebuttal, petitioner reiterated that, regardless of respondent's testimony that he hated her and the members of her family, she did not harbor any hatred against him. She testified that, for C.D.'s sake, she focuses on the loving relationship she and respondent once shared, and that she does not want C.D. to grow up feeling that his father hates his grandmother. She stated that she would welcome respondent into her home, and that she wants C.D. to feel that she and respondent are two people who can talk to each other and can love him together. Petitioner concluded by testifying that she wants to visit with C.D. in her home as often as possible, and that she wants the child to have a loving relationship with his maternal aunt, uncle and cousins. She testified that she loves and respects C.D. for his humor, his intelligence, and his sweet nature.

#### ***INTERVIEW WITH C.D.***

The Court, in the presence of the Law Guardian, held an in camera interview with C.D. on August 25, 2004. Both parties were permitted to submit potential questions for C.D. to the Court. The Court found C.D. to be extremely personable, intelligent and perceptive. While mindful of preserving the confidentiality of what was discussed with C.D., the Court can report that the child was emphatic about his desire to visit with petitioner on a regular, consistent and unfettered basis. He confirmed many of the allegations made by petitioner, particularly her claims regarding the special bond that exists between them and his desire to spend more time with her. He was able to separate the roles that petitioner and the respondent play in his life, and he freely expressed his love and affection for both. He also expressed a strong desire to visit with his maternal aunt, uncle and cousins, and gave no reason why such visitation should be curtailed or limited in any way. Finally, C.D. was asked by the Court how he would feel if petitioner was no longer permitted to visit with him. C.D. reacted with such negative and violent opposition to the idea of terminating the visitation with petitioner that the Court finds it would be cruel, harmful and contrary to C.D.'s best interest to even consider mandating such a result.

#### ***REPORT OF THE LAW GUARDIAN***

As previously set forth, Robert D. Gallo, Esq., upon consent of the parties, was appointed as Law Guardian to represent the interests of C.D. Mr. Gallo was present throughout the entire course of the trial and during the in camera interview of C.D. On October 22, 2004, Mr. Gallo submitted his Report and Recommendation.

Early in his report, the Law Guardian states that C.D. "has consistently for over a period of two years expressed a sincere desire to see his grandmother regularly with substantial blocks

of time allowed for visitation.” The Law Guardian states that C.D. developed a “deep and continuing bond” with the petitioner during the period of time that petitioner lived in respondent’s residence and cared for him, his ailing mother and his father. The Law Guardian describes the cooperative efforts of both petitioner and respondent to ensure that C.D. was well cared for during these difficult times, and asserts that the relationship with his grandmother is “central to his well being.”

The report further states that during the period of almost five years while the parties and C.D. lived together, C.D., with the full support and encouragement of the respondent, came “to know his grandmother as unconditionally loving and supportive of his needs.” It states that the bond between petitioner and C.D., and the love and affection which the child feels for his grandmother, are evident to anyone who speaks with C.D. The report also recognizes the substantial amount of time that C.D. has spent with petitioner during the summer months at her home in East Hampton and characterizes these visits as “truly happy times for C.D. with ample opportunity for both fun and academic pursuits”.

The Law Guardian dismisses, as insubstantial and unconvincing, respondent’s attempts to characterize petitioner as emotionally unstable and respondent’s assertions that her presence would pose a threat to C.D. Likewise, he reports that the evidence developed at trial shows that respondent, at times, has been unreasonable in his actions and demands on the petitioner with respect to visitation, and that such behavior has substantially increased the animosity between the parties. Additionally, Mr. Gallo reports that “since respondent is at least partially responsible for his current strained relationship with the petitioner, he should not be allowed to use this as an excuse to curtail the petitioner’s visitation at the expense of his client.” With regard to respondent’s claim regarding his poor relationship with petitioner’s son, J.S., as a reason that petitioner should not see C.D., the Law Guardian concludes that petitioner “is a mature, responsible adult who loves her grandson dearly and would not, I believe, expose him to any person or circumstances which might endanger him or his well being.”

In consideration of C.D.’s well being and best interests, and the special relationship that C.D. shares with his grandmother, the Law Guardian strongly recommends substantial and regular visitation between the petitioner and C.D. He recommends that any visitation granted petitioner should not be restricted, constrained or limited in any manner. More specifically, the Law Guardian recommends that petitioner be granted unsupervised and unrestricted visitation with C.D. pursuant to the following schedule:

- a. During the school year, one weekend per month from Friday at 5:00 pm through Sunday at 5:00 pm;
- b. During summer vacation, two weekends per month from Friday at 5:00 pm through Sunday at 5:00 pm;
- c. One full week of visitation during the summer vacation, to include one of the two weekends proposed in subparagraph “b” above;

d. Reasonable telephone contact during the week, year round.

The Law Guardian concludes that the granting of visitation pursuant to this schedule is in C.D.'s best interest and is consistent with the child's desire for "unfettered, substantial and regular" contacts with petitioner.

### ***OUTSTANDING MOTIONS***

At the close of petitioner's case, respondent made a motion to dismiss the proceeding based on the arguments previously discussed herein. Both petitioner and the Law Guardian opposed the motion. A motion for a directed verdict made at the close of a petitioner's case should be granted only where the trial court finds that, "upon the evidence presented, there is no rational process by which the fact trier could base a finding in favor of the nonmoving party" (*Szczerbiak v Pilat*, 90 NY2d 553, 556, 664 NYS2d 252 [1997]; *see*, CPLR 4401; *Blum v Fresh Grown Preserve Corp.*, 292 NY 241, 54 NE2d 809 [1944]; *Godlewska v Niznikiewicz*, 8 AD3d 430, 779 NYS2d 79 [2d Dept 2004]; *Matter of Scarozza v Tudor Plaza*, 306 AD2d 927, 762 NYS2d 322 [4th Dept 2003]; *Matter of Tracy*, 195 AD2d 469, 600 NYS2d 138 [2d Dept], *lv denied* 82 NY2d 662, 610 NYS2d 149 [1993]).

In determining a motion to dismiss for failure to present a prima facie case, the petitioner's evidence must be accepted as true and given the benefit of every favorable inference which may be drawn from such evidence (*see*, *Szczerbiak v Pilat*, *supra*; *Matter of Le Blanc v Morrison*, 288 AD2d 768, 733 NYS2d 294 [3d Dept 2001]; *Gonzalez v Gonzalez*, 262 AD2d 281, 691 NYS2d 122 [2d Dept 1999]; *Wai Foon Chan v Yuk Sim Chan*, 193 AD2d 575, 597 NYS2d 422 [2d Dept 1993]). Such a motion must be denied where facts are in dispute, where different inferences may be drawn from the evidence, or where the credibility of the witnesses is in question (*see*, *C.K. Rehner, Inc. v Arnell Constr. Corp.*, 303 AD2d 439, 756 NYS2d 608 [2d Dept 2003]; *Cameron v City of Long Beach*, 297 AD2d 773, 748 NYS2d 26 [2d Dept 2002]; *Noyes v Galen*, 267 AD2d 365, 700 NYS2d 73 [2d Dept 1999]). Here, respondent's motion is denied, as petitioner's testimony was sufficient to establish prima facie that granting her visitation rights would be in C.D.'s best interest.

### ***RELEVANT CASE LAW***

Domestic Relations Law §72 was enacted "to enable children deprived of the society of their grandparents by the untimely death of a parent to maintain the bonds of kinship" (*Matter of Ehrlich v Ressler*, 55 AD2d 953, 391 NYS2d 152 [2d Dept 1977]). The statute, which gives grandparents standing to assert visitation rights with grandchildren, is designed to recognize that "[v]isits with a grandparent are often a precious part of a child's experience and there are benefits which devolve upon the grandchild \* \* \* which he cannot derive from any other relationship" (*Matter of Ehrlich v Ressler*, *supra*, at 953, 391 NYS2d 152, *quoting Mimkon v Ford*, 66 NJ 426, 437, 332 A2d 199 [1975]; *see*, *Matter of Emanuel S. v Joseph E.*, 78 NY2d

178, 573 NYS2d 36 [1991]). The statute, however, does not create an absolute or automatic right of visitation for grandparents (*Matter of Wilson v McGlinchey*, 2 NY3d 375, 380, 779 NYS2d 159 [2004]; *Lo Presti v Lo Presti*, 40 NY2d 522, 526, 387 NYS2d 412 [1976]). Rather, it is a procedural vehicle by which grandparents may assert that visitation with a minor grandchild either physically present in or having a close connection with New York is warranted (*Lo Presti v Lo Presti*, *supra*, at 526, 387 NYS2d 412; *see, Matter of Wilson v McGlinchey*, *supra*).

A court is faced with two questions when a grandparent seeks visitation rights. First, it must determine whether the grandparent has standing to make an application for visitation based upon the death of a parent or equitable circumstances which permit the court to entertain the petition. If the court concludes that the grandparent has established the right to be heard, then it must decide whether such visitation is in the best interests of the child (*see, Matter of Wilson v McGlinchey*, *supra*; *Matter of Emanuel S. v. Joseph E.*, *supra*; *Lo Presti v Lo Presti*, *supra*; *Matter of Ziarno v Ziarno*, 285 AD2d 793, 726 NYS2d 820 [3d Dept], *lv denied* 97 NY2d 605, 737 NYS2d 53 [2001]; *Matter of Ann M.C. v Orange County Dept. of Social Servs.*, 250 AD2d 190, 682 NYS2d 62 [2d Dept 1998], *lv dismissed* 93 NY2d 957, 694 NYS2d 634 [1999]). The death of C.D.'s mother provided petitioner, C.D.'s maternal grandmother, with automatic standing to seek visitation (*see, Domestic Relations Law §72; Matter of Eggleton v Clark*, 11 AD3d 459, 782 NYS2d 771 [2d Dept 2004]; *Matter of Ziarno v Ziarno*, *supra*). Thus, the inquiry for this Court is whether granting petitioner visitation with C.D., over his father's objections, would promote the child's best interests.

Although there is no set formula for determining a child's best interests, "an essential part of the inquiry is the nature and extent of the grandparent-grandchild relationship" (*Matter of Emanuel S. v Joseph E.*, *supra*, at 182, 573 NYS2d 36; *see, e.g., Matter of Wilson v McGlinchey*, *supra*; *Matter of Eggleton v Clark*, *supra*; *Matter of Ziarno v Ziarno*, *supra*). The court also must consider the nature and basis of the parent's objection to visitation (*see, Matter of Emanuel S. v Joseph E.*, *supra*; *Matter of Follum v Follum*, 302 AD2d 861, 755 NYS2d 145 [4th Dept 2003]; *Matter of Kenyon v Kenyon*, 251 AD2d 763, 674 NYS2d 455 [3d Dept 1998]), and the degree of animosity that exists between the parent and the grandparent (*see, Matter of Wilson v McGlinchey*, *supra*; *see also, Matter of Janczuk v Janczuk*, 305 AD2d 680, 760 NYS2d 222 [2d Dept], *lv denied* 100 NY2d 515, 769 NYS2d 202 [2003]; *Matter of DiBerardino v DiBerardino*, 229 AD2d 539, 645 NYS2d 848 [2d Dept 1996]). Significantly, the existence of animosity between the parent and grandparent cannot alone be the basis for denying visitation rights (*Matter of DiBerardino v DeBerardino*, *supra*, at 540, 645 NYS2d 848; *see, Lo Presti v Lo Presti*, *supra*; *Matter of Layton v Foster*, 95 AD2d 77, 466 NYS2d 723 [3d Dept 1983], *affd* 61 NY2d 747, 472 NYS2d 916 [1984]). However, animosity coupled with family dysfunction may serve as a basis for denying visitation rights (*Matter of DiBerardino v DiBerardino*, *supra*, at 540, 645 NYS2d 848; *see, Matter of Wilson v McGlinchey*, *supra*; *Matter of Janczuk v Janczuk*, *supra*; *Matter of Liantonio v Davanzo*, 303 AD2d 589, 756 NYS2d 480 [2d Dept 2003]; *Matter of Gloria R. v Alfred R.*, 209 AD2d 179, 618 NYS2d 24 [1st Dept 1994], *lv dismissed in part, denied in part* 85 NY2d 882, 626 NYS2d 752 [1995]; *Matter of Higuchi v Brown*, 204 AD2d 452, 611 NYS2d 625 [2d Dept 1994]).

***FINDINGS OF FACT AND  
CONCLUSIONS OF LAW***

The Court has carefully reviewed all of the evidence presented at the hearing, the applicable statutory and case law, and the arguments and written submissions of counsel. It has conducted an in camera interview with C.D., and reviewed the report prepared by the court-appointed Law Guardian for the child. In addition, the Court has had an opportunity to observe the demeanor of the various witnesses called to testify, and has made determinations on issues of credibility with respect to these witnesses. Based upon the preponderance of the credible evidence, the Court now makes the following determinations:

It is beyond doubt that petitioner and C.D. developed an extraordinarily close relationship during the nearly five-year period that she lived with him and respondent. Petitioner, having voluntarily assumed the role of caregiver during a critical time in C.D.'s early childhood, devoted nearly five years of her life to making a loving home for C.D., who, along with respondent, was suffering from the tragic loss of A.D. The intimate bond between petitioner and C.D. is a natural result of that shared experience.

The Court found petitioner to be intelligent, warm and completely devoted to C.D. and his well-being. Petitioner, a highly credible witness, demonstrated that she consistently puts C.D.'s interests ahead of her own and that she will continue to foster C.D.'s emotional and intellectual development. Petitioner clearly appreciates and respects the separate roles that she and respondent play in C.D.'s life, and wishes to improve her relationship with respondent for the sake of C.D. There is no credible evidence in the record substantiating respondent's claim that petitioner seeks to usurp his role as C.D.'s parent.

The Court rejects as unfounded the allegations by respondent that petitioner is emotionally unstable and poses a threat to C.D.'s safety and well being. There also is no evidence supporting respondent's allegation that the existing visitation arrangement is having a detrimental effect on C.D. Instead, the Court agrees with the conclusion of the Law Guardian, who participated in all of the various stages of this proceeding and whose expertise is highly valued, that the animosity that exists between the parties is largely attributable to respondent's unreasonable behavior toward petitioner over the past two years. It further agrees with the Law Guardian's determination that the relationship with petitioner is central to C.D.'s well being.

C.D. articulated a deep love for and attachment to petitioner during the in camera interview with the Court. The child expressed in unequivocal language a desire for frequent, regular, and substantial visitation with petitioner. The child also demonstrated the capacity to separate, understand and appreciate the different relationships that exist with respondent and petitioner, and to love and care for both parties individually.

Conversely, respondent is either unwilling or unable to separate his needs and C.D.'s needs. The Court finds that his testimony often was incredible and tailored to raise the specter of family dysfunction. In particular, it finds that his professions of hatred for petitioner lacked a

rational basis, and that they were offered at the hearing simply to support his claims that visitation would make it difficult for him to properly raise C.D. and that witnessing such hostility would be detrimental to the child. It also concludes that most of respondent's complaints regarding petitioner's care-giving skills, particularly those related to her ability to administer the medication prescribed for C.D., are contrived, as are his concerns regarding J.S.'s behavior toward C.D. Further, the evidence demonstrates that respondent repeatedly puts his needs and wants ahead of the needs of C.D., and that he is engaged in a course of behavior designed to minimize petitioner's role in C.D.'s life. His actions, whether attributed to egocentric impulses or feelings of insecurity, reveal a troubling lack of appreciation of the importance to C.D. of the relationship with his grandmother.

The testimony presented by respondent's family members merely confirmed petitioner's devotion to C.D. and the extraordinary services she provided to C.D. and respondent after A.D.'s death. As indicated above, the Court disregarded as incredible the testimony of Witness # 6. Further, the testimony of the other non-party witnesses was of limited probative value, as they simply offered their opinions as to appropriate child-rearing behavior or confirmed the existence of animosity between petitioner and respondent. The Court notes that respondent failed to present any expert testimony substantiating his claim of family dysfunction.

Respondent's argument that Domestic Relations Law §72 is unconstitutional is rejected. Respondent failed to provide notice to the Attorney General that he was challenging the constitutionality of the statute as required by Executive Law §71 and CPLR 1012(b) (*see, Matter of McGee v Korman*, 70 NY2d 225, 519 NYS2d 350 [1987]). In any event, the Appellate Division has held Domestic Relations Law §72 is constitutional under *Troxel v Granville*, 530 US 57, 120 S Ct 2054 (2000) (*see, Matter of Hertz v Hertz*, 291 AD2d 91, 738 NYS2d 62 [2d Dept 2002]; *Matter of Morgan v Grzesik*, 287 AD2d 150, 732 NYS2d 773 [4th Dept 2001]).

The Court also rejects respondent's claim that Domestic Relations Law §72 may only be invoked in circumstances where a grandparent has been denied any visitation with his or her grandchild. Domestic Relations Law §72 states that a grandparent has standing to petition the court for visitation rights where either or both parents of the child are dead, or "where circumstances show that conditions exist which equity would see fit to intervene." In *Matter of Emanuel S. v Joseph E.*, *supra*, the Court of Appeals held that grandparents have automatic standing to seek visitation where a parent of the child has died. In all other cases, held the Court of Appeals, the standing requirement is met if the grandparents establish a sufficient existing relationship with their grandchild, "or, in cases where that [relationship] has been frustrated by the parents, a sufficient effort to establish one" (*Matter of Emanuel S. v Joseph E.*, *supra*, at 182, 573 NYS2d 36; *see, Matter of Wilson v McGlinchey*, *supra*). As stated earlier, petitioner, the grandparent of a child whose mother is deceased, has automatic standing to pursue visitation with C.D. (*see, Matter of Eggleton v Clark*, *supra*; *Matter of Ziarno v Ziarno*, *supra*). The Court finds no language in the statute supporting the argument that a petition for visitation may only be brought when a parent or custodian deprives the grandparent of any contact with the grandchild. Finally, respondent's argument that the petition must be denied, as the true intent of the proceeding is to secure visitation rights for J.S., is rejected as without merit.

Although mindful of respondent's right to rear C.D. as he sees fit, and of his stated concern that petitioner undermines his parental authority, the Court finds that he has failed to present any credible evidence warranting either the termination of the relationship between petitioner and C.D. or the imposition of restrictions on the right of visitation. Instead, the evidence in the record establishes the existence of a very close, loving relationship between petitioner and C.D., and that C.D.'s best interest is served by granting petitioner regular, unfettered visitation.

The Court reminds respondent that the instant matter is not a law school exercise or a case in a textbook, and that grandparent visitation is not dependent on the whims of a parent. Simply stated, the only question before this Court is whether C.D.'s best interest is advanced by continuing the special relationship that he shares with petitioner. The existence of animosity between the parties, while relevant, does not strip petitioner of her right to seek judicial intervention to protect the relationship with her daughter's child. The Court, having concluded beyond a doubt that it is in C.D.'s interest that such relationship be maintained and encouraged, sincerely hopes that the parties now will work together to mend the damage that has been done to their relationship.

### ***VISITATION SCHEDULE***

Based upon a review of the record herein and the recommendation of the Law Guardian, it is hereby

***ORDERED*** that petitioner shall have the following visitation with C.D, which visitation, except as set forth herein, shall not be limited or restricted in any way:

1. During the school year, every fourth weekend from 5:00 p.m. on Friday until Sunday at 5:00 p.m., commencing on Friday, December 10, 2004.
2. During the months of July and August, every other weekend from Friday at 5:00 pm until Sunday at 7:00 p.m.
3. During the month of July or August, one ten-day period of visitation, with such period commencing at 5:00 p.m. on Friday and continuing until 7:00 p.m. on the following Sunday. This extended visitation period shall occur during one of the two weekends during which petitioner is entitled to enjoy visitation with C.D. under the terms of subparagraph 2 above.
4. One midweek dinner visitation per month on a Wednesday, from 5:00 p.m. until 7:00 p.m. Petitioner shall provide respondent with notice of the date of such dinner visitation on or before the

5<sup>th</sup> day of each month. Dinner visitation shall take place in the vicinity of C.D.'s home, with the child picked up and returned to his home by petitioner during the time period allotted for said visit. This midweek visitation shall not interfere with any of C.D.'s regularly scheduled academic or social activities. In the event of such a conflict, petitioner shall be permitted to substitute another midweek dinner visitation during the same month.

5. During C.D.'s winter vacation from school, between Christmas and New Year's Day, one weekend from 5:00 pm on Friday until 7:00 p.m. on Sunday. This visitation period shall be in addition to any other visitation which is scheduled for the month of December.
6. In the event that respondent is not celebrating the holidays of Passover, Rosh Hashanah, and/or Hanukkah, visitation from 5:00 p.m. until 8:00 p.m. on the first night of such holiday. However, if C.D.'s school is not in session the morning after such holiday, the visitation shall begin at 5:00 p.m. on the first night of the holiday and continue until 7:00 p.m. the next day.
7. Telephone communications from petitioner to C.D. shall be permitted by respondent between the hours of 7:00 p.m. and 8:00 p.m. on Tuesday and Thursday of each week, and at any reasonable time on every Sunday that visitation does not occur. Respondent shall permit C.D. to telephone petitioner whenever C.D. desires. Only petitioner and C.D. shall be on the line during their telephone conversations, and no conversations may be recorded in any manner.
8. Notwithstanding the foregoing, respondent shall always be permitted to spend respondent's birthday and Fathers' Day with C.D. In the event respondent's birthday or Fathers' Day occurs on a scheduled visitation weekend, petitioner's visitation time shall be rescheduled for the following weekend.
9. On November 19 of every year, if visitation is not taking place on that day, petitioner shall be permitted to speak with C.D. by telephone at any reasonable time of the day.
10. Such other or different times as the parties may mutually agree upon.

And it is further

**ORDERED** that all rights of visitation set forth herein shall take place either at petitioner's residence or at such other place as she may desire, provided she notifies respondent of any location other than her residence where overnight visitation will occur. Petitioner shall be responsible for arranging appropriate transportation for C.D. She also shall keep respondent informed as to C.D.'s whereabouts during any vacation periods C.D. spends with her, and shall provide respondent with an appropriate vacation itinerary, i.e., flight information, hotel information, and telephone numbers.

The parties shall exert every reasonable effort to foster a feeling of affection between C.D. and the other party, and shall work together to facilitate visitation. Neither party shall do anything which may estrange the child from the other party, negatively affect the child's opinion of the other party, or otherwise hamper the free and natural development of the child's love and respect for the other party.

The foregoing shall constitute the decision and order of this Court.

Dated: December 1, 2004  
Central Islip, New York

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**SANDRA L. SGROI, J.S.C.**