

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

COURT OF APPEALS

STATE OF NEW YORK

MATTER OF GRANGER,

Respondent,

-against

No. 72

MISERCOLA,

Appellant.

20 Eagle Street
Albany, New York 12207
March 20, 2013

Before:

CHIEF JUDGE JONATHAN LIPPMAN
ASSOCIATE JUDGE VICTORIA A. GRAFFEO
ASSOCIATE JUDGE SUSAN PHILLIPS READ
ASSOCIATE JUDGE ROBERT S. SMITH
ASSOCIATE JUDGE EUGENE F. PIGOTT, JR.
ASSOCIATE JUDGE JENNY RIVERA

Appearances:

MARY P. DAVISON, ESQ.
DAVISON LAW OFFICE PLLC
Attorneys for Appellant
61 North Main Street
Suite C
Canandaigua, NY 14424

MELISSA L. KOFFS, ESQ.
KOFFS LAW FIRM
Attorney for the Child
P.O. Box 366
Chaumont, NY 13622

CHARLES J. GREENBERG, ESQ.
CHARLES J. GREENBERG
Attorneys for Respondent
3840 East Robinson Road, #318
Amherst, NY 14228

David Rutt
Official Court Transcriber

1 CHIEF JUDGE LIPPMAN: 72.

2 Okay, counselor. Go ahead.

3 MS. DAVISON: Good afternoon, Your Honors.
4 May it please the Court, I'm Mary Davison. I'm
5 appearing on behalf of the appellant mother in this
6 matter.

7 CHIEF JUDGE LIPPMAN: What - - - you want
8 any rebuttal time, counselor?

9 MS. DAVISON: Thank you, Judge. I'd like
10 two minutes.

11 CHIEF JUDGE LIPPMAN: Two minutes. Sure.
12 Go ahead.

13 MS. DAVISON: As you know, I'm asking the
14 Court to consider that the lower courts erred in this
15 matter by applying a test that required a rebuttable
16 presumption.

17 CHIEF JUDGE LIPPMAN: Why isn't Weiss good
18 law?

19 MS. DAVISON: Weiss is excellent law.
20 Weiss - - - the position I'm in - - -

21 CHIEF JUDGE LIPPMAN: Why can't Weiss and
22 Tropea be read together?

23 MS. DAVISON: They can be - - -

24 CHIEF JUDGE LIPPMAN: Yeah.

25 MS. DAVISON: - - - because both of those

1 cases stand for the proposition that I submit this
2 Court should adopt in prison visitation cases which
3 is the child's best interest is always - - - always
4 trumps every other factor and every other concern of
5 the - - -

6 CHIEF JUDGE LIPPMAN: So you - - - so you -
7 - - you think that that's inconsistent with saying
8 there's a presumption of visitation?

9 MS. DAVISON: Yes, just the same way that
10 this court in Tropea determined that - - - that the -
11 - - I think that you called it the multitier - - -

12 CHIEF JUDGE LIPPMAN: You think Weiss says
13 that there's no presumption?

14 MS. DAVISON: I Weiss - - - this Court, to
15 my knowledge, has never used the word "presumption".

16 JUDGE SMITH: Well, you would - - - you
17 would - - - you would admit there's a presumption in
18 favor of visitation where no - - - where nobody's
19 incarcerated?

20 MS. DAVISON: I don't think this Court has
21 ever used the word "presumption", Your Honor.

22 JUDGE SMITH: So you - - - you said even
23 when you have two - - - I guess, if two parents get
24 separated, I mean, common sense, nobody's in jail,
25 there's no other extraordinary fact, wouldn't you

1 expect the one who's not - - - who - - - the
2 noncustodial parent to have visitation?

3 MS. DAVISON: As you said in Weiss, it
4 follows almost as a matter of course. I think that's
5 different than calling it a presumption.

6 CHIEF JUDGE LIPPMAN: Well, let's say it
7 matters as a matter of course. Why - - - why doesn't
8 that apply to this particular case? What's so
9 unusual about this case that - - - that you agree
10 that incarceration, in and of - - - by itself, isn't
11 a disqualification for visitation rights?

12 MS. DAVISON: I absolutely agree with that.

13 CHIEF JUDGE LIPPMAN: Okay. So why isn't
14 this - - - in the matter of normal course, that there
15 should be visitation in this case?

16 MS. DAVISON: Because whereas incarceration
17 should not serve as a bar to visitation, neither
18 should it be an advantage to one party.

19 CHIEF JUDGE LIPPMAN: Let's just say as a
20 matter of course there should be visitation,
21 incarceration or not. Why in this case should we not
22 follow that generally accepted rule?

23 MS. DAVISON: Because in this case the
24 court didn't look to the child's best interest. The
25 court said, oh, we've got this presumption, you

1 haven't crossed over this threshold, you haven't
2 jumped the hurdle, therefore, we're never going to
3 get to the child's best interests. And that's
4 exactly the opposite of what this Court said should
5 be the case in Tropea. In Tropea the Court said,
6 meaningful access tier, wrong; the exceptional
7 circumstance tier, wrong. Let's look to the child's
8 best interests.

9 JUDGE SMITH: Why are you not - - - I mean
10 - - - I mean, you - - - you resist the word
11 "presumption", but I think most - - - yeah, but if
12 you want to substitute the words "follows almost as a
13 matter of course", you would say there's no doubt
14 that when nobody's in jail and there's nothing else
15 extraordinary, visitation does follow almost as a
16 matter of course.

17 MS. DAVISON: I agree that it's a --

18 JUDGE SMITH: That's - - -

19 MS. DAVISON: - - - it's a - - -

20 JUDGE SMITH: And you - - - but would you
21 say that when somebody is in jail that's no longer
22 true; it's no longer a matter of course?

23 MS. DAVISON: No, I think it's an important
24 factor that must be considered, but I think the
25 child's best interests have to be considered first

1 for this reason.

2 JUDGE SMITH: Well, the child - - - you
3 always consider the child's best interests first, but
4 I guess I'm just - - - to me, it seems perfectly
5 possible to say, and I'm not sure whether you're
6 saying it or not, if nobody's in jail, then you would
7 normally allow visitation; if somebody is in jail,
8 then maybe you do, maybe you don't.

9 MS. DAVISON: That's - - - that's not what
10 I'm saying. What I'm - - -

11 JUDGE SMITH: Why not? What's wrong with
12 it?

13 MS. DAVISON: What I'm saying is if you
14 require this presumption that visitation sh - - -
15 that incarcerated parents should have visitation,
16 then - - - and you require the other party to rebut
17 that presumption, which imposes a burden on that
18 second party, then there are going to be times - - -

19 JUDGE SMITH: Let - - - let me - - - let me
20 try it again. Why are you not saying that if there
21 is no imprisoned parent then visitation should be the
22 norm, but if there is an imprisoned parent, then
23 there isn't a norm and you have to take each case one
24 at a time? What's wrong with that and why aren't you
25 arguing it?

1 MS. DAVISON: I'm arguing that this test
2 should - - -

3 JUDGE SMITH: I - - - no, no. The question
4 was why are now not arguing - - - what's wrong with
5 the test I proposed?

6 MS. DAVISON: Because - - - because there
7 are going to be situations in which - - - in either
8 case, in which - - - in "either case" I mean
9 nonincarceration visitation and just ordinary
10 noncustodial visitation, where the child is denied
11 visitation because one party has been able to rebut
12 the presumption and conversely that the child is
13 forced to go on visitation because the other party
14 hasn't rebutted the presumption, and there are
15 certain - - -

16 JUDGE SMITH: You're - - - you're arguing
17 why there should not be a presumption in
18 incarceration cases or in any case?

19 MS. DAVISON: In any visitation case.

20 JUDGE SMITH: Why - - - why are you
21 reluctant to make a distinction between incarceration
22 and nonincarceration cases? Surely it's relevant
23 that daddy's in jail.

24 MS. DAVISON: It's a factor that can with
25 considered, just like in Tropea you said - - -

1 JUDGE SMITH: And it's - - - and it's not -
2 - - it's not ordinarily a plus for visitation.

3 MS. DAVISON: Interestingly enough, you
4 were talking about diligent efforts in the prior
5 case. There are no diligent efforts with respect to
6 an incarcerated parent. So, no, it's not an
7 advantage. And yes, they are - - -

8 CHIEF JUDGE LIPPMAN: What you're arguing
9 is that the basic law in New York, you're telling us,
10 is - - - is - - - is not to favor visitation, that
11 the basic law in New York, as I understand what you
12 are saying, is that there is no presumption, there is
13 no matter of course, there is only the best interests
14 of the child. Isn't that contrary to our
15 jurisprudence in our - - -

16 MS. DAVISON: Yes, it is. And I'm sorry.
17 That's not what I'm saying, and if it's - - -

18 CHIEF JUDGE LIPPMAN: So what are you
19 saying?

20 MS. DAVISON: What I'm saying is there - -
21 - there is a constitutional right to the society of
22 your child. I would be foolish to say otherwise.
23 I'm not saying that. What I'm saying is that that
24 right is not absolute and this Court should not hold
25 it - - -

1 CHIEF JUDGE LIPPMAN: But everyone knows
2 it's not absolute. That's not contrary to what - - -
3 to what I'm saying is the generally accepted law in
4 New York.

5 MS. DAVISON: I think that by - - -

6 CHIEF JUDGE LIPPMAN: No one's saying
7 there's an absolute right to visitation. Visitation
8 is favored. Whatever words you want to use,
9 visitation is favored, and of course, the best
10 interests of the child are at issue. So what are we
11 - - - what are we arguing about? What is the - - -
12 what is - - - I don't understand what you're - - -
13 are you asking us to change the - - - our
14 jurisprudence, our precedents in New York on
15 visitation?

16 MS. DAVISON: No. I'm asking you to extend
17 Tropea. I'm asking you to say - - -

18 CHIEF JUDGE LIPPMAN: Extend Tropea?

19 MS. DAVISON: Yes.

20 CHIEF JUDGE LIPPMAN: Meaning extend Tropea
21 beyond to obliterate the normal preference for
22 visitation on a normal - - - in the normal course you
23 get visitation?

24 MS. DAVISON: No. In Tropea, there's - - -
25 there were issues of visitation, as well. You know,

1 when one parent is relocating, there is a question
2 what relationship - - -

3 CHIEF JUDGE LIPPMAN: But you've already
4 acknowledged that Weiss and Tropea are the law; both
5 of them are good law.

6 MS. DAVISON: Yes.

7 CHIEF JUDGE LIPPMAN: You know, so why
8 aren't you just arguing in this case you don't think
9 visitation is proper?

10 MS. DAVISON: In this case, I don't think
11 it's proper.

12 CHIEF JUDGE LIPPMAN: Right. But I don't
13 think we can get to that point until we understand
14 what the ground rules are.

15 JUDGE PIGOTT: Before you go, if I
16 understand what you're saying is this judge when he
17 made it said, well, there's a presumption that this
18 man is going to get visitation simply because he's
19 the father.

20 MS. DAVISON: Right.

21 JUDGE PIGOTT: You want to take that away
22 and you want to say what the judge ought to be doing
23 is looking through the eyes of the child - - -

24 MS. DAVISON: Right.

25 JUDGE PIGOTT: - - - and say what's in the

1 child's best interest, carcerated, incarcerated,
2 whatever, look in the - - - look at the best interest
3 of the child, and if you do that in this case, then
4 that presumption that tipped in favor of the father
5 would go away and this child would not be doing that
6 visitation.

7 MS. DAVISON: Well, again, I don't agree
8 with the use of the word "presumption", but yes - - -

9 JUDGE PIGOTT: Sorry. Right.

10 MS. DAVISON: - - - in essence, that's what
11 I'm arguing.

12 JUDGE GRAFFEO: So when, under your - - - I
13 don't want to call it a test, but under your
14 analysis, when would a child be able to - - - when
15 would there ever be an order for visitation for an
16 incarcerated parent?

17 MS. DAVISON: Any time it's in the child's
18 best interests. May I indulge the Court with an
19 anecdote?

20 CHIEF JUDGE LIPPMAN: Go ahead, quickly,
21 counselor.

22 MS. DAVISON: You'll remember my client,
23 Mr. Gause, last June who was in prison for ten years
24 on a murder conviction; at the time of his
25 incarceration, he had a one-year-old son who

1 continued to visit with him throughout the course of
2 his incarceration. And when Your Honors reversed his
3 conviction in June, he reunited with the child. It
4 was in that child's best interest to have visitation
5 with his dad. And so to say that just because he's
6 incarcerated and in a hopeless situation - - -

7 CHIEF JUDGE LIPPMAN: Okay. So in a - - -
8 in a nutshell, your argument is the only test is
9 interest of the child. Visitation stands or falls
10 based on that?

11 MS. DAVISON: My - - - I ask the Court to
12 extend Tropea. The primary concern has to be with
13 the child - - -

14 CHIEF JUDGE LIPPMAN: Okay. That is the -
15 - - that is the test, period.

16 MS. DAVISON: - - - factoring in - - -

17 CHIEF JUDGE LIPPMAN: Okay.

18 MS. DAVISON: - - - the parent's concerns
19 including - - -

20 CHIEF JUDGE LIPPMAN: Yes.

21 MS. DAVISON: - - - the very important
22 right to the society of a child.

23 CHIEF JUDGE LIPPMAN: Okay. Thank you.

24 MS. DAVISON: Thank you.

25 MS. KOFFS: Good afternoon, Your Honors.

1 I'm Melissa Koffs, attorney for the child.

2 CHIEF JUDGE LIPPMAN: Counselor, what's the
3 law in New York in relating - - - in relation to
4 visitation in general and visitation with an
5 incarcerated parent?

6 MS. KOFFS: Visitation in general, the law
7 is that it is presumed in the child's best interest,
8 but then you do need to go to a best-interest test.

9 CHIEF JUDGE LIPPMAN: Right. But it is
10 presumed that it is - - - it is a favored thing; it
11 is in the normal course is visitation?

12 MS. KOFFS: Correct.

13 CHIEF JUDGE LIPPMAN: Okay.

14 MS. KOFFS: And then you should go - - -

15 CHIEF JUDGE LIPPMAN: Continue.

16 MS. KOFFS: Then you - - -

17 JUDGE SMITH: Well, let me - - - could I
18 just ask a follow-up - - -

19 CHIEF JUDGE LIPPMAN: Sure.

20 JUDGE SMITH: - - - question. Is that
21 still true if one parent is incarcerated? Does the
22 presumption still hold?

23 MS. KOFFS: In most cases that I have seen
24 for the - - - for if a parent is incarcerated, yes.
25 Most cases then look to whether is it - - - is it in

1 the child's best interests.

2 JUDGE SMITH: Are you - - - are you - - -
3 let's see. Your - - - your colleague there seems to
4 be against presumptions in all cases. You're saying
5 there's one in every case?

6 MS. KOFFS: From practicing in family court
7 every day, that - - -

8 JUDGE SMITH: Okay, but we're not bound - -
9 - there's no precedence, as far as I know, binding us
10 on this. I mean, how - - - what - - - if we - - -
11 what are you asking us to say the rule is? I don't
12 think anyone has any doubt that visitation is the
13 norm or the usual thing. Indeed it would be rare
14 that you wouldn't have it when there's no
15 incarcerated parent. What should the law be when
16 there is an incarcerated parent?

17 MS. KOFFS: That after the court looks at
18 whether - - - at the presumption that - - - then that
19 incarcerated parent proves that it's in the best
20 interest of the child.

21 CHIEF JUDGE LIPPMAN: Is it the same - - -
22 is it the same presumption whether they're in - - - I
23 think what Judge Smith said is does it change when -
24 - - when you have an - - - is the - - - is there a
25 different presumption - - - is the rule different

1 when it's an incarcerated versus a nonincarcerated
2 parent?

3 MS. KOFFS: I believe it should be because
4 when - - -

5 CHIEF JUDGE LIPPMAN: You believe there
6 should be a different rule?

7 MS. KOFFS: Yes, because when you have - -
8 -

9 CHIEF JUDGE LIPPMAN: Okay. What is the
10 difference in the rule?

11 MS. KOFFS: When you have an incarcerated
12 parent, you do not know where that incarcerated
13 parent is going to be placed in jail. And I think
14 that you should look at the age of the child, how
15 long they're going to have to be in the car, if they
16 have a rela - - - if they have - - -

17 CHIEF JUDGE LIPPMAN: Is the presumption
18 different or are there different factors to consider?

19 MS. KOFFS: I think there should be
20 different factors - - -

21 CHIEF JUDGE LIPPMAN: Okay.

22 MS. KOFFS: - - - to consider.

23 JUDGE SMITH: Are you suggesting that once
24 you have incarceration, you've got a complicated
25 enough case and you can't presume anything and you

1 just take a look at the whole case?

2 MS. KOFFS: Correct. In the present case,
3 the child did not - - - well, opposing counsel is
4 going to argue that the child knew the father outside
5 of prison. When I met with the child, he did not
6 know his father, and you're going - - - and he was
7 traveling - - - well, now he's traveling close to a
8 seven-hour round trip to go to see a gentleman that
9 he did not know. He referred to him as the voice on
10 the phone or the voice on the tape. He knew - - -

11 CHIEF JUDGE LIPPMAN: Has the father though
12 - - - in - - - assuming that's the case, has the
13 father made efforts to be a father in terms of the
14 child? Do you have knowledge that he's done many
15 things that show a concern to be the father?

16 MS. KOFFS: Once he was incarcerated, he
17 made more effort than prior to when he was
18 incarcerated.

19 JUDGE SMITH: He does a lot more than a lot
20 of incarcerated fathers do.

21 MS. KOFFS: Correct. I do agree to that,
22 but sending a child, especially in this case, once a
23 month or once every other month, is - - - it's not in
24 his best interest.

25 JUDGE SMITH: Are you saying - - - are you

1 saying in this case that ordering visitation is an
2 abuse - - - was an abuse of discretion or are you
3 saying that the wrong test was applied and we ought
4 to send it back and have them do it under the right
5 test?

6 MS. KOFFS: I'm saying that the wrong test
7 was applied and it needs to be sent back. He did not
8 - - -

9 JUDGE SMITH: So you would not say that it
10 would always be an abuse to order visitation on these
11 facts? You'd say - - - but you'd say you got to - -
12 - you got to approach it differently?

13 MS. KOFFS: Correct. Moore v. Schill, in
14 similar facts, the court ordered semiannual
15 visitation which I believe is much better.

16 CHIEF JUDGE LIPPMAN: What was the test
17 that you believe was applied here and what was wrong
18 with the test? Is it the same presumption issue?
19 You've already agreed that there is a presumption.

20 MS. KOFFS: The - - - the judge stated from
21 the bench in the lower court that there was a
22 presumption and that the try - - - and that the
23 father is trying to have a relationship; send him.
24 He did not state as - - - as to my client's age. He
25 didn't look at the - - -

1 CHIEF JUDGE LIPPMAN: So is the test - - -

2 MS. KOFFS: - - - traveling distance.

3 CHIEF JUDGE LIPPMAN: - - - wrong or the
4 application wrong?

5 MS. KOFFS: I believe the test is wrong
6 because he sh - - - he should have looked at my
7 client's age. He should have looked at the traveling
8 distance. At the time that this was - - -

9 CHIEF JUDGE LIPPMAN: Yeah, but aren't
10 those the factors under the test rather than the
11 test? I'm not trying to put words in your mouth.
12 I'm just trying to understand what you're arguing.

13 MS. KOFFS: They are factors in regards to
14 this, but in regards to a test, the best-interest
15 test in - - - when there are incarcerated parents,
16 you look at the relationship with the parent, how far
17 away is this traveling, how - - - how the parent has
18 tried to interact. And in regards to this case, the
19 judge did not look at - - - at those factors even
20 with an incarcerated parent. So I'm asking the Court
21 to kind of give the lower courts guidance in - - - in
22 - - - once you have that presumption.

23 CHIEF JUDGE LIPPMAN: But are you asking
24 for a different test? You are, I guess, asking for a
25 different test for incarcerated parent - - - a

1 different standard for incarcerating parents that the
2 presumption that you agree applies to incarcerated
3 and the nonincarcerated, there's a different standard
4 when you're dealing with incarcerated, in your view.

5 MS. KOFFS: Yes.

6 CHIEF JUDGE LIPPMAN: Okay.

7 MS. KOFFS: Yes.

8 JUDGE RIVERA: Counsel, I'm sorry. Can I
9 just go back? You were saying that - - - is it your
10 position that the judge failed to consider the impact
11 of travel or just disagrees with you on the impact of
12 travel?

13 MS. KOFFS: I'm not saying he failed to
14 consider. He did - - - he did state that there was a
15 traveling distance, and we have already been back
16 before that - - - that same judge again on this case
17 due to a violation.

18 JUDGE RIVERA: Um-hum.

19 MS. KOFFS: And he - - - he looked at the
20 traveling distance, and he said, well, you know what,
21 dad's trying, send him. It wasn't - - - he - - -
22 when I stated to the judge - - - when - - - in front
23 of the violation, I said, Judge, what if he moves
24 even further away; well, we'll deal with it when that
25 comes. So then you're going to have the

1 nonincarcerated parent having to petition every time
2 that this person - - -

3 JUDGE PIGOTT: But isn't that what you're
4 arguing? I mean, didn't - - - didn't you say those
5 are the factors that you've got to consider?

6 MS. KOFFS: Well, yes, and it - - -

7 JUDGE PIGOTT: So if they were next door -
8 - - I mean, if - - - you know, my neck of the woods.
9 If they're living in Buffalo and he's at Wende, which
10 is about forty-five minutes away, but then he gets
11 moved down to Great Meadow, then someone's going to
12 have to do something, right?

13 MS. KOFFS: Right.

14 JUDGE PIGOTT: Under any test.

15 MS. KOFFS: Right. But he - - - he didn't
16 - - - he didn't look to see whether - - - where we're
17 from, we have two prisons within easy driving
18 distance.

19 CHIEF JUDGE LIPPMAN: Counselor, again, it
20 sounds like you're just disagreeing with the judge
21 rather than some change in our law or some extension
22 of a case. It just sounds like you disagree with the
23 judgments.

24 MS. KOFFS: Well, I do have a disagreement
25 with his judgment, but he - - - he did not - - - he

1 just - - - he looked at just saying there's a
2 presumption, therefore, he should have it. He did
3 not look at set - - -

4 CHIEF JUDGE LIPPMAN: Do you think - - -

5 MS. KOFFS: - - - and - - -

6 CHIEF JUDGE LIPPMAN: Do you think Tropea
7 has to be extended to - - - for you to win on this
8 argument?

9 MS. KOFFS: I do believe that in a way
10 Tropea should be extended because Tropea - - - when
11 you're guiding clients in family court, you - - - you
12 can say, under Tropea these are - - - these are the
13 factors that you need to meet to win this burden.
14 I've had an incarcerated parent who was trying to get
15 visitation with his child in a com - - - in front of
16 a completely different judge. I cannot say to him,
17 these are the factors you're going to have to meet.

18 CHIEF JUDGE LIPPMAN: And is Weiss still
19 going to be good law after we extend Tropea?

20 MS. KOFFS: Weiss would be - - - Weiss is
21 good law, and I believe that it would still be good
22 law because Weiss sets the precedent that even a
23 parent who's incarcerated gets visitation.

24 CHIEF JUDGE LIPPMAN: Okay.

25 MS. KOFFS: And then if you extend Tropea,

1 we then have the test.

2 CHIEF JUDGE LIPPMAN: Okay. Thank you,
3 counselor.

4 MS. KOFFS: Thank you.

5 MR. GREENBERG: Good afternoon. I'm
6 Charles Greenberg. I'm representing the father in
7 this case. May it please this honor - - - honorable
8 Court, Ms. Davison and Ms. Koffs.

9 Your Honor, Weiss is good law on its face.
10 We don't need to extend it or change it or anything.

11 CHIEF JUDGE LIPPMAN: What's the law in New
12 York? We've been discussing what the law is in New
13 York.

14 MR. GREENBERG: Well, the law in New York
15 is Weiss, you know. And you know, the quote that we
16 have from Weiss is that it's presumed that, you know,
17 visitation follows as a matter of course unless
18 there's extraordinary circumstances that - - -

19 JUDGE GRAFFEO: Does that - - - does that
20 mean you can't consider different factors pertaining
21 to that case?

22 MR. GREENBERG: You can consider different
23 factors. They consider any factors they wish, but
24 the basic law remains is that it is presumed to be in
25 the best interest - - - and I don't have the problem

1 with the word "presumption" - - - to be in the best
2 interest of the child to have visitation with the
3 noncustodial parent, and somebody who's looking - - -
4 and, therefore, the reasonable implication with that,
5 Your Honors, is that if anybody is trying - - - if
6 the custodial parent is trying to modify or
7 extinguish that, that they do have the burden to
8 explain to the court as to why there should not be
9 visitation.

10 JUDGE SMITH: But why isn't - - -

11 JUDGE GRAFFEO: Why did - - - why did the
12 facts of this case not - - - why weren't the facts of
13 this case sufficient to override that presumption?

14 MR. GREENBERG: Because - - - well, he's
15 incarcerated, and we all admit to that. I mean, you
16 know - - - but these facts - - - the reason why he is
17 incarcerated is unrelated to the child. I mean, the
18 cases where the courts - - - when you - - - in the
19 cases that I cited in my brief where the courts have
20 restricted or even - - - or actually not permitted an
21 inmate visitation with the - - - between the
22 incarcerated parent and the child is when the child
23 himself or herself was directly affected by the fa -
24 - - usually the father's crime.

25 JUDGE SMITH: So are you saying it would

1 always be an abuse of discre - - - that in the case
2 of an incarcerated parent - - -

3 MR. GREENBERG: Um-hum.

4 JUDGE SMITH: - - - it would always be an
5 abuse of discretion to deny visitation unless you had
6 some other factor?

7 MR. GREENBERG: I wouldn't exactly say it's
8 an abuse of discretion, but I think that if you're
9 going to say we're not going to give you the
10 visitation solely because of your incarceration, the
11 incarceration - - - or the crime would have to be
12 somehow directly impacting the child such as for - -
13 -

14 JUDGE SMITH: Well - - - well, how can - -
15 - how can it not? How can your - - - how can your
16 father being incarcerated not directly impact you?

17 MR. GREENBERG: Well, I was talking about
18 the crime, like in the case - - - the crime really
19 because - - -

20 JUDGE SMITH: Oh, you mean it would have to
21 be a child-related crime?

22 MR. GREENBERG: It would - - - no, no.
23 Well, like, for example, if the parent - - - the
24 father was incarcerated because, let's say he took a
25 gun and fired it off in the presence of the child,

1 that puts the child in danger.

2 JUDGE SMITH: Oh, I see. But if - - - but
3 if - - - but if he just murdered seven people acro -
4 - - on the other side of town, that would not be
5 something you could take into account?

6 MR. GREENBERG: We just might take it into
7 consideration, but under that fact I wouldn't
8 necessarily deny the visitation, but you would - - -
9 certainly would take that into consideration.

10 JUDGE SMITH: I guess - - - let me - - -
11 let's try this case. Suppose the courts below had
12 ruled the other way and denied visitation. Would
13 that be an abuse of discretion or would that just be
14 a different exercise of the discretion?

15 MR. GREENBERG: On these facts, that would
16 be an abuse of discretion because the - - - well, for
17 what my client is in charge - - - is in - - - is
18 incarcerated for was for drug sales on the streets
19 that were unrelated to the - - - to the child and, in
20 fact, even took place before the child was even born
21 so he - - -

22 JUDGE GRAFFEO: It sounds like you don't
23 want the court to consider the age of the child, the
24 distance involved, who's transporting the child.

25 MR. GREENBERG: Oh, no, no. By all means,

1 take all of that into account, Judge, but in our - -
2 - but - - - but even - - -

3 JUDGE GRAFFEO: So how come you keep going
4 back to what the charge is?

5 MR. GREENBERG: Oh, no, no. If you want to
6 take into - - - and you - - - but the - - - that's
7 exactly what the lower court did. The child is
8 currently five years old. He got the visitation
9 every other month. That takes into account the
10 distance to the correctional facility. So that's
11 exactly what the lower court did. The lower court -
12 - - the Jefferson County Family Court and then as
13 reviewed by the Fourth Department, you know, looked
14 at the law, looked at Weiss, and said that yes, there
15 is this presumption of visitation, and then fashioned
16 a visitation order taking into account all these
17 other - - - everything else.

18 CHIEF JUDGE LIPPMAN: Counselor, is your
19 argument then - - - and don't let me tell you what
20 your argument is; you tell us. Is your argument that
21 - - - that there is no different standard for
22 incarcerated versus - - - versus nonincarcerated
23 parents, and - - - and absent that, there's nothing
24 wrong with this - - - this ruling by the judge? Is
25 that the argument?

1 MR. GREENBERG: My argument is that the
2 law, Weiss, stands, that you can just apply it to any
3 - - - to the extent - - -

4 JUDGE PIGOTT: Then why doesn't it apply in
5 Tropea? Ms. Davison makes the argument that when we
6 talk about relocation, in other words the parent
7 moving as opposed to the child being transported,
8 that we look at the best interest of the child first
9 and we don't - - - we don't talk presumptions.

10 MR. GREENBERG: Well, I think that in - - -
11 in Tropea is - - - Tropea and Weiss agree with each
12 other because Weiss says that it's in the best
13 interest of the child to have visitation. So, I
14 mean, that's why I mean - - - that's why I think
15 Tropea - - - as I read Tropea, it actually brings - -
16 - Tropea actually comes - - - was brought in - - -
17 maybe I'm not using the correct word, but is now in
18 conformity with Weiss. So that's why I don't think
19 Weiss and Tropea necessarily - - -

20 JUDGE PIGOTT: So - - -

21 MR. GREENBERG: - - - are in conflict - - -

22 JUDGE PIGOTT: Well - - -

23 MR. GREENBERG: - - - with each other.

24 JUDGE PIGOTT: - - - then help me out if -
25 - - let's assume the mother now who has this child

1 says I'm moving to Indiana - - -

2 MR. GREENBERG: Okay.

3 JUDGE PIGOTT: - - - and, therefore,
4 visitation to the prison is out of the question.

5 MR. GREENBERG: No, not necessarily. It
6 may not be every other month. It may have to be
7 every third month or something along those lines.

8 JUDGE PIGOTT: So - - - right. So the
9 father then petitions and says, well, don't let her
10 move because I've got visitation rights - - -

11 MR. GREENBERG: Um-hum.

12 JUDGE PIGOTT: - - - that say what they say
13 - - -

14 MR. GREENBERG: Right.

15 JUDGE PIGOTT: - - - and so she shouldn't
16 move to Indiana - - -

17 MR. GREENBERG: Well, that's your best-
18 interest standard again.

19 JUDGE PIGOTT: You don't want to wait for
20 my question. Okay.

21 MR. GREENBERG: Oh, I'm sorry.

22 JUDGE PIGOTT: That's okay. I think I got
23 your answer already. You're saying it - - - you're
24 saying that the presumption applies in Tropea, as
25 well?

1 MR. GREENBERG: The presumption applies
2 would be in Tropea, but even if you wanted to go
3 straight - - - straight best-interest standard and
4 get rid of the presumption, that wouldn't necessarily
5 change the result in this case because it's still in
6 - - - it's still in the best interest for the child
7 to have visitation with the father.

8 JUDGE SMITH: Did the courts below apply a
9 presumption or not?

10 MR. GREENBERG: Yes, they did because
11 that's what Weiss - - - that Weiss mandates. I mean,
12 Weiss may not actually use the word "presumption",
13 but that's the reasonable inference - - -

14 JUDGE SMITH: Okay. I mean, I guess I have
15 no problem with the idea that in the normal case
16 where there's no incarceration, of course there's a
17 presumption in favor of visitation or if you don't
18 want to say "presumption", there's a something. But
19 why shouldn't that presumption go away in the case of
20 incarceration, not - - - you know, I'm not saying
21 that - - - that wouldn't mean there's a presumption
22 the other way. It would just mean that an
23 incarceration case is a little more complicated.

24 MR. GREENBERG: Well, incarceration, you
25 keep the presumption, but what I would do, Judge, if

1 you want to - - - is to keep the presumption but just
2 list incarceration as one of the many factors that
3 the courts can consider, but that's not - - - all it
4 does - - -

5 CHIEF JUDGE LIPPMAN: Counselor - - -

6 MR. GREENBERG: Yes.

7 CHIEF JUDGE LIPPMAN: - - - I - - - let me
8 understand.

9 MR. GREENBERG: Okay.

10 CHIEF JUDGE LIPPMAN: It would require a
11 change in our law to make a different rule for
12 incarcerated persons as opposed to nonincarcerated
13 persons.

14 MR. GREENBERG: That would be correct.

15 CHIEF JUDGE LIPPMAN: Is that where it's
16 at? And if we change the rule, then we'd look at it
17 in whatever the new rule is.

18 MR. GREENBERG: Sure. You can change the
19 rule.

20 CHIEF JUDGE LIPPMAN: And what if you
21 looked at it in the rule that Judge Smith is - - - is
22 giving a hypothetical that - - - that when you have
23 an incarcerated parent, there's no presumption? What
24 happens in our case?

25 MR. GREENBERG: Well, I'm sorry?

1 CHIEF JUDGE LIPPMAN: What happens in our
2 case - - -

3 MR. GREENBERG: In this case?

4 CHIEF JUDGE LIPPMAN: - - - if you change
5 the law to say that there's a different rule for
6 incarcerated parents, and that different rule is no
7 presumption or whatever you want to call it - - -

8 MR. GREENBERG: Um-hum.

9 CHIEF JUDGE LIPPMAN: - - - in any
10 direction; is the result still the same in our case?

11 MR. GREENBERG: In this case, the result
12 would still be the same because - - - well, starting
13 with the fact that the child is five years old and -
14 - - and that the - - - the other side - - - and that
15 the appellant, with respect to - - - the appellant
16 never really came up with a convincing reason as to
17 why my client should not have visitation with the
18 young child. I mean, the - - - he's - - -

19 CHIEF JUDGE LIPPMAN: But you don't dispute
20 that the - - - all these issues as to the - - - the
21 length you'd have to travel to go see the
22 incarcerated person and all the logistics and
23 everything else are valid considerations that go to
24 the best interests of the child?

25 MR. GREENBERG: Absolutely. Of all those -

1 MR. GREENBERG: Let's see.

2 CHIEF JUDGE LIPPMAN: Anything else,
3 counselor?

4 MR. GREENBERG: No, I think I - - - unless
5 there are any other questions, I think that's pretty
6 much all.

7 CHIEF JUDGE LIPPMAN: Okay, counselor.
8 Thank you.

9 MR. GREENBERG: Thank you.

10 CHIEF JUDGE LIPPMAN: Counselor, rebuttal?

11 MS. DAVISON: Thank you. Counsel's
12 argument highlights my point. He says mom didn't
13 produce enough evidence to overcome dad's presumption
14 and - - -

15 CHIEF JUDGE LIPPMAN: No, but he also says
16 if there is no presumption he's convinced the result
17 is same. That's his argument. You could argue
18 whatever you want.

19 MS. DAVISON: My point is what happens if
20 mom just can't, you know, not because the facts don't
21 address - - -

22 CHIEF JUDGE LIPPMAN: The judge considers -
23 - - why doesn't the judge consider the best interest
24 of the child to determine, you know, what happens,
25 whether you can or you can't? That's what judges do.

1 MS. DAVISON: Because the presumption
2 prevents the judge from getting there if mom can't
3 rebut the presumption.

4 CHIEF JUDGE LIPPMAN: Well - - -

5 MS. DAVISON: That's my problem. And in
6 Tropea, you know, this Court said no single factor
7 should be treated as dispositive or given such
8 disproportionate weight as to predetermine the
9 outcome. Well, that's what you're doing by saying
10 there's a presumption. That's what you're saying,
11 because he's in prison, he gets something. And - - -
12 and I - - - and I don't think that was the intent of
13 - - -

14 CHIEF JUDGE LIPPMAN: So you're saying
15 contrary to your adversary that if we change the rule
16 in New York, that would change the result in this
17 case.

18 MS. DAVISON: I'm not sure - - - you know,
19 when the court apply - - - applies the wrong test,
20 it's hard to say what would have happened if - - -

21 CHIEF JUDGE LIPPMAN: Yeah, but what's the
22 - - - yeah, but - - -

23 JUDGE PIGOTT: Well, you're asking for a
24 jump ball.

25 MS. DAVISON: Pardon me, Judge?

1 JUDGE PIGOTT: You got to start somewhere,
2 it seems to me. You want to say the child doesn't
3 belong anywhere and now we're going to decide through
4 the eyes of the child whether the child goes to the
5 prison to visit her father - - -

6 MS. DAVISON: Yes.

7 JUDGE PIGOTT: - - - or not, and what the
8 judge said is - - - was obviously he ought to be able
9 to his chi - - - his - - - I mean, why - - - what's
10 wrong with at least having some starting point that
11 doesn't - - - as I say, a jump ball where it's fifty-
12 fifty where you go anywhere?

13 MS. DAVISON: All I'm saying is you start
14 from the kid's perspective, what's best for this kid.
15 I have to consider the fact that it's his dad and he
16 needs to see his dad and his dad needs to see him. I
17 have to consider the fact that he's three. And he's
18 not five, by the way; his birthday is in September of
19 2008. He was three at the time of this proceeding
20 which is what's before the Court at this time,
21 whether that adjudication when he was at age three
22 was - - - was properly made.

23 But - - - okay, so he's - - - he's three.
24 He lives three or four or five hours away. He has no
25 relationship with these paternal relatives who

1 somehow are going to show up on the doorstep some day
2 and start bringing him. His mom works as a waitress.
3 She's thirty years old. She's not - - -

4 JUDGE PIGOTT: Well, what do you do when
5 he's six?

6 MS. DAVISON: I guess.

7 JUDGE PIGOTT: Then you say, well, he
8 hasn't seen his father for three years.

9 MS. DAVISON: I guess it would be up to the
10 father at that point to file another petition and
11 take - - -

12 JUDGE PIGOTT: Then he's going to lose
13 because the judge said, you know, he can't visit
14 because he's only three.

15 MS. DAVISON: He - - - he lost in 2012;
16 that doesn't mean he's going to lose in 2015 because
17 his age will have changed.

18 JUDGE PIGOTT: Do you - - - do you buy that
19 argument though that he's going to have a better
20 chance in '15 after he hasn't seen the child for
21 three years than - - - than in '12 when at least he's
22 got a hope of seeing him?

23 MS. DAVISON: I think it's unfortunate that
24 people put themselves in these situations - - -

25 JUDGE PIGOTT: I do, too.

1 MS. DAVISON: - - - but they put themselves
2 in these situations and have to live with the
3 outcome. And a child should not be asked to shoulder
4 the burdens imposed upon a father who chose to sell
5 drugs.

6 CHIEF JUDGE LIPPMAN: Okay, counselor.
7 Thank you.

8 MS. DAVISON: Thank you.

9 CHIEF JUDGE LIPPMAN: Thank you, all of
10 you. Appreciate it.

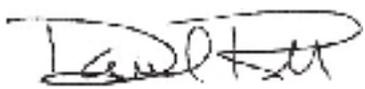
11 (Court is adjourned)

12
13
14
15
16
17
18
19
20
21
22
23
24
25

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

C E R T I F I C A T I O N

I, David Rutt, certify that the foregoing transcript of proceedings in the Court of Appeals of the Matter of Granger v. Misercola, No. 72 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



Signature: _____

Agency Name: eScribers

Address of Agency: 700 West 192nd Street
Suite # 607
New York, NY 10040

Date: March 23, 2013