

IN THE SUPREME COURT OF THE STATE OF DELAWARE

ABIGAIL THOMAS, ¹	§
	§
Respondent Below-	§ No. 414, 2005
Appellant,	§
	§
v.	§ Court Below—Family Court
	§ of the State of Delaware,
NELLIE NICHOLS-JONES,	§ in and for Sussex County
	§ File No. CK04-03917
Petitioner Below-	§
Appellee.	§

Submitted: August 18, 2006

Decided: October 3, 2006

Before **STEELE**, Chief Justice, **HOLLAND**, and **BERGER**, Justices.

ORDER

This third day of October 2006, upon consideration of the opening brief, the brief of amicus curiae,² and the record below, it appears to the Court that:

(1) The appellant, Abigail Thomas (“Mother”), filed this appeal from an order of the Family Court granting a petition for visitation filed by the appellee, Nellie Nichols-Jones (“Grandmother”), who is the paternal grandmother of Mother’s minor daughter, Hannah. Under the unique factual

¹ The Court has assigned pseudonyms to the parties and the minor child in this case. *See* Del. Supr. Ct. R. 7(d).

²After the appellee failed to file an answering brief, the Court requested the assistance of amicus curiae to address appellant’s arguments on appeal. The Court thanks Gerald I. Street, Esquire and Mitchell W. May, Esquire for assisting the Court by filing an amicus brief. Their service is in the highest tradition of the Delaware Bar.

circumstances of this case, we find no merit to the arguments raised in Mother's opening brief. Accordingly, we affirm the judgment of the Family Court.

(2) The record reflects that Hannah's parents were never married and, after living together, separated days after Hannah's birth in June 1999. Grandmother had an ongoing relationship with Hannah until her second birthday. Grandmother requested contact after that, but Mother refused. The Family Court found as a matter of fact that Grandmother's efforts to have visitation with Hannah thereafter were limited. Hannah's contact with her father also has been limited. Father testified that he had a motorcycle accident in 2002, which left him seriously injured and required five surgeries over time. Although Mother initially brought Hannah to visit Father, those visits ended. In 2003, Mother married another man. Hannah has developed a close relationship with him and his family.

(3) In 2004, Mother petitioned the Family Court to have Hannah's last name changed to her new husband's name. Father testified that, until he was served with the petition for name change, he had no idea where Hannah or Mother lived. Since October 2004, Father has been permitted supervised visitation with Hannah at the Family Visitation Center for one hour a week. In granting Grandmother's petition for visitation, the Family Court ordered

that Grandmother's visits with Hannah would be limited to the time that Father enjoyed his supervised visitation rights with Hannah for one hour per week.

(4) Mother raises two issues in her opening brief on appeal. First, she contends that the Family Court erred as a matter of law in granting the petition for visitation because Grandmother did not offer any evidence that visitation was in Hannah's best interests. Second, Mother asserts that the Family Court erred because it gave no special weight to Mother's determination that visitation with Grandmother was not in her daughter's best interests.

(5) Petitions for visitation by grandparents are governed by 10 Del. C. § 1031(7). Section 1031(7) provides, in its entirety, that the Family Court may:

(7) Upon petition thereto, grant grandparents reasonable visitation rights as the Court shall determine with respect to the grandchild, regardless of marital status of the parents of the child or the relationship of the grandparents to the person having custody of the child; provided however:

a. That when the natural or adoptive parents of the child are cohabiting as husband and wife, grandparental visitation may not be granted over both parents' objection. The trier of fact shall make the ultimate decision based on the best interest of the child.

b. That wherever practicable, the Court shall provide that the maternal grandparents' visitation time shall occur when the child is placed with or has visitation with the mother and the paternal grandparents' visitation time shall occur when the child is placed with or has visitation with the father, irrespective of the place of residence

of the parents and/or the grandparents, unless otherwise agreed to by all parties involved.

(6) In seeking visitation, the burden of proof is on the grandparent to establish by a preponderance of the evidence that the child's visitation with the grandparent is in the best interests of the child.³ The grant or denial of visitation is within the sound discretion of the Family Court.⁴ In this case, the Family Court had the unique opportunity to hear live testimony from the parties and from Father, who supported Grandmother's petition for visitation. Despite Mother's contention to the contrary, we find sufficient evidence in the record to support the Family Court's conclusion that visitation with Grandmother was in Hannah's best interests.

(7) Furthermore, we disagree with Mother's contention that the Family Court failed to give any special weight to Mother's decision that visitation with Grandmother was not in Hannah's best interest, in violation of the United States Supreme Court's plurality holding in *Troxel v. Granville*.⁵ In *Troxel*, the plurality recognized a presumption that fit parents act in the best interests of their children and held that courts should give "some special weight" to a fit parent's determination regarding grandparent

³ *Rosemary E.R. v. Michael G.Q.*, 471 A.2d 995, 996 (Del. 1984).

⁴ *Id.* at 997.

⁵ 530 U.S. 57 (2000).

visitation.⁶ In *Troxel*, however, there was only one living parent to make decisions for the children. That is not the case here. Although Father is a non-custodial parent, he still enjoys parental rights with respect to Hannah. Father's determination that visitation with Grandmother was in Hannah's best interest was entitled to the same weight as Mother's contrary determination. The result was that the wishes of each parent were considered along with the other best interest factors under 13 Del. C. § 722. Under the circumstances, we find no abuse of the Family Court's discretion in finding that visitation with Grandmother was in Hannah's best interest and in ordering that Grandmother's visitation rights would be limited to joining Father during his weekly hour-long supervised visits.

NOW, THEREFORE, IT IS ORDERED that the judgment of the Family Court is AFFIRMED.

BY THE COURT:

/s/ Randy J. Holland
Justice

⁶ *Id.* at 62.