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Skim Milk and Statutes: When Family Law Isn't What it Seems

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In the words of Gilbert and Sullivan in *HMS Pinafore*, “Things are seldom what they seem, Skim milk masquerades as cream.” True in light opera. True in family law. This article explores two areas of family law in which “black sheep dwell in every fold, and all that glitters is not gold.”

The Mirage of Grandparent Visitation Rights

With the enactment of DRL Section 72 in 1966, grandparents gained the precious right to visitation with their grandchildren. The statute reflected the presumption that grandparents are a positive influence on children’s lives.

After all, a strong grandparent-grandchild relationship can improve cognitive abilities, mental health, nutrition, and general wellbeing (*Sari E.*, 68 Int'l J. Pub. Health 1606292 (2023)).

Thus, new hope emerged when the statute gave grandparents standing to petition for visitation, and, after a further amendment in 2003, for custody. However, this law, in all its iterations, may not necessarily be as it seems.

Standing: The First Legal Obstacle for Grandparents

There are two areas where grandparents may encounter difficulty on the path to a visitation or custody order.

The first is proving that they have standing to bring the suit in the first place. DRL section 72 reads, in relevant part: “Where either or both of the parents of a minor child, residing within this state, is or are deceased, or where circumstances show that conditions exist which equity would see fit to intervene, a grandparent or the grandparents of such child may apply to the supreme court”

If one parent has died, there isn't an issue of standing, however, in cases where both parents are still alive, the “conditions... [in] which equity would see fit to intervene,” a provision added by an amendment in 1975, may be hard to recognize. The fact that the child is deprived of a relationship with their grandparents is not enough.

In the *Matter of Emanuel S. v. Joseph E.*, 78 N.Y.2d 178 (Ct. App. 1991), the New York Court of Appeals set new standards for circumstances where equity might see fit to intervene, stating that while the 1975 amendment does “liberalize” the statute, “the equitable circumstances provision is not intended to allow automatic standing to seek visitation.”

Courts must consider many factors, first and foremost the basis of the parents' objection to the grandparents' visitation.

Additionally, they must consider whether the grandparents have established (or tried to establish) a significant existing relationship with their grandchild(ren), as “it is not sufficient that the grandparents allege love and affection for their grandchild.”

The Court of Appeals did not rule on standing in *Emanuel S.* but remitted the case to Family Court to reassess standing.

The legislation was amended in 2003 to include a provision that that grandparents could petition for custody where the existence of an extraordinary circumstance could be demonstrated; “an extended disruption of custody, as such term is defined in this section, shall constitute an extraordinary circumstance” (Domestic Relations Law Section 72 [2] [a]).

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Such term is defined as “a prolonged separation of the respondent parent and the child for at least [24] continuous months during which the parent voluntarily relinquished care and control of the child and the child resided in the household of the petitioner grandparent or grandparents ...”

However, similar to the matter of standing in cases where “equity would see fit to intervene,” this circumstance can be difficult to prove. In the matter of *Suarez v. Williams*, 26 N.Y.3d 440 (Ct. App. 2015), it was disputed that there was a prolonged separation between parent and child, and that the parent relinquished care and control of the child.

In this case, the child had lived with his grandparents for ten years, but the mother argued that she saw him routinely and cared for him during her frequent visits.

The Appellate Division reversed the lower court’s decision and dismissed the grandparents’ petition on this basis.

While the Court of Appeals eventually overturned this decision, the case still shows that grandparents have a significant burden of proof, even if the circumstances seem to be clearly in their favor.

The Burden of Proof After ‘*Troxel*’

The question of standing is only one (and, arguably, the less contentious) issue when it comes to grandparent visitation and custody under DRL Section 72. The more contentious issue is the one involving the burden of proof.

All sides agree that the children’s best interests are important, and it is statutory that the courts may grant visitation to grandparents “as the best interest of the child may require” (DRL Section 72 [1] [a]).

Statutory law about grandparents’ visitation rights were established on the presumption that grandparents created a positive impact in a child’s life. But in 2000, the Supreme Court, faced with the case of *Troxel v. Granville*, 530 US 57 (2000), articulated that the courts would err if they imposed the burden of disproving that visitation would be in the best interest of children on the parents.

In other words, the burden should be on the grandparents to prove that visitation with them would be in the best interests of the children, not vice versa.

In *Troxel*, the Supreme Court upheld a Washington State Supreme Court order that dismissed the paternal grandparents’ petition for visitation against their daughter-in-law, Tommie Granville, which had been granted by a lower court.

In the majority opinion, Justice Sandra Day O’Connor asserted that the Washington non-parental visitation statute, which enabled any person to petition for visitation at any time if it was in the best interest of the child, infringed upon the due process clause of the Fourteenth Amendment which “protects the fundamental right of parents to make decisions concerning the care, custody, and control of their children.”

Therefore, by granting the petition for visitation, the lower court failed to honor the right of the mother to rear her children as she saw fit. In summary, according to the United States Supreme Court, special weight should be granted to the decision of the parent, and the burden shouldn’t shift.

New York courts felt the impact of *Troxel*. In a 2001 case, the Third Department heard a case in which the Family Court granted a visitation order to the maternal grandfather. The grandfather was granted automatic standing following the death of the child’s father.

However, the Appellate Division overturned the order because the grandfather failed to meet the burden of proving that his visitation would be in the child's best interest, as he was not necessarily close with the child, so there was no basis for a visitation order; "if the fitness of a parent is not questioned, interference with that parent's right to limit those with whom his or her child associates is only justified upon a showing of 'some compelling state purpose which furthers the child's best interests.'" (*Ziarno v. Ziarno*, 285 AD.2d 793 (3rd Dep't 2001)).

Additionally, cases in which animosity is a factor will often result in a similar ruling, because animus would impel a parent to limit contact.

For example, in the matter of *Wilson v. McGlinchey*, 2 N.Y.3d 375 (Ct. App. 2004), the grandparents' visitation order was terminated because tension and anxiety from the visits were affecting the mother's ability to parent.

Rebutting the Presumption

Although the presumption in favor of a fit parent's decision is hard to rebut, it is not impossible. In the matter of *ES v. PD*, 8 N.Y.3d 150 (Ct. App. 2007), the father appealed a negative ruling, arguing that the court had not given special weight to his parental decision and challenging the constitutionality of DRL Section 72.

The New York State Supreme Court had granted the maternal grandmother, who had lived with the family and cared for the child for years following the death of her daughter, reasonable visitation after finding that it was in the best interest of the child.

The Appellate Division and the Court of Appeals upheld the decision of the Supreme Court, and addressed the father's argument about DRL Section 72, stating that the two-pronged approach—considering both standing and best interest—presented obstacles to the grandparents which inherently shifted the presumption in favor of the parent.

In this matter, the grandmother was able to overcome these obstacles and rebut the rebuttable presumption, proving that her continued relationship with the child was in his best interest.

The New York Court of Appeals cited *Troxel* to demonstrate that the Supreme Court did not find court intervention itself unconstitutional, just the lack of presumption in favor of the parent's decision, which the court did give in *ES*.

In sum, although DRL Section 72 provides a path for grandparents to seek visitation and custody with their grandchildren, a weighing of the equities – the benefit of the grandchildren’s physical relationships with their grandparents versus the strains on the nuclear family –may not favor the grandparents.

Thus, even after it is decided that the grandparents have standing, the burden of proof will be on them to show that their presence is in the best interest of the child.

This is a difficult task, as courts are hesitant to challenge the decision of a fit parent following *Troxel*. In many cases, the fact that visitation would not cause an adverse effect on the child(ren) is not enough, there must be some benefit to visitation as well.

New York’s Marriage License Requirements

A second area that calls Gilbert and Sullivan to mind is the validity of marriage. Article 3 of the DRL is entitled, “Solemnization, Proof and Effect of Marriage.” DRL Sections 10-25 comprise the section. DRL Section 13 is very straightforward.

It reads, “It shall be necessary for all persons intended to be married in New York state to obtain a marriage license from a town or city clerk in New York state and to deliver said license, within sixty days, to the clergyman or magistrate who is to officiate before the marriage ceremony may be performed.”

Marriage licenses may be important for record-keeping purposes, for determination of assets, inheritance, and legitimacy of children. Requiring marriage licenses might reduce litigation to determine validity of certain marriages

Yet, just a few sections later, the DRL seemingly forgets about Section 13 and introduces Section 25, which reads, “nothing in this article contained shall be construed to render void by reason of a failure to procure a marriage license any marriage solemnized between persons of full age.”

Thus, a marriage license is actually not necessary, as DRL Section 13 might lead one to believe, if a marriage is solemnized. Case law pertaining to these sections establishes a strong presumption in favor of marriage, contradicting DRL Section 12, similar to the strong presumption in favor of a fit parent’s decision in the grandparent area discussed above.

Marriage Without a License: The Power of Solemnization

DRL Section 12 states that to solemnize a marriage, “the parties must solemnly declare in the presence of a clergyman, magistrate, or such one-day marriage officiant and the attending witness or witnesses that they take each other as spouses.”

Within the context of Section 12, this means that this is all a couple must do to get married, and a lack of a marriage license will not affect that. Additionally, whether the parties intended to become or believe that they are married is irrelevant.

Even if two people conduct their lives as single individuals, if they have participated in a solemnization ceremony, they will not be able to overcome New York’s presumption in favor of marriage.

For example, in *Spalter v. Spalter*, 224 A.D.3d 419 (1st Dep’t 2024), the First Department unanimously affirmed Justice Michael L. Katz’s decision in a case in which the couple had participated in a Jewish wedding that was solemnized by a rabbi, under a chuppah (a canopy under which Jewish weddings are performed), in the presence of several guests.

The couple had even signed a Ketubah (a Jewish marriage contract which must be signed in the presence of two witnesses in order to be valid under Jewish law). As noted above, according to DRL Section 12, this constitutes a marriage.

As noted above, according to DRL Section 25, the lack of a marriage license means essentially nothing. According to the wife, however, the couple never intended to enter a recognizable marriage.

They lived individual lives, as though they were unmarried, and, the wife asserted, had only participated in the ceremony for their children to be accepted into Jewish day school and synagogue.

They had even signed a document at this ceremony asserting that their marriage was not recognized under New York law.

The First Department held that whether the couple believed themselves to be married or not did not matter, because marriage “is a special status governed by laws and the state and not determined by those entering the contract.”

It can often be complicated to determine if a marriage was solemnized. In the matter of *Yusupov v. Baraev* 197 AD.3d 538 (2nd Dep’t 2021), the plaintiff

commenced a divorce and testified that the parties had been married by a rabbi and signed a Ketubah.

However, there were no photos of the ceremony, and the plaintiff had filed as single in her tax returns. Additionally, the defendant testified that he did not sign the Ketubah as he did not write Hebrew.

The court determined that the parties were not married, affirming the supreme court, as the only evidence of the ceremony was the Ketubah, which the defendant could not have signed. In a similar case, *Bernstein v. Benchemoun*, 216 AD.3d 893 (2nd Dep’t 2023), the parties had married in a Jewish ceremony in Florida and then executed a second Ketubah in New York.

The Florida marriage was determined to be void, as marital status is generally decided in New York by the law where the marriage was celebrated and under Florida law, the marriage license requirement is mandatory.

Moreover, the New York rabbi, who had supervised the second Ketubah signing, testified that he did not solemnize a marriage, because in his eyes, they were already married under Jewish law.

The Second Department unanimously affirmed the lower court’s grant of the defendant’s motion to dismiss the matrimonial action.

In light of these cases, in order to overcome the presumption in favor of marriage, one must prove that a marriage was not solemnized, not that the parties did not believe themselves to be married or that they conducted themselves as such.

The Presumption of the Validity of Marriage

While the Florida marriage was void in *Bernstein*, the strong presumption in favor of marriage can sometimes transcend state lines.

In *Matter of Estate of Farraj*, 72 AD.3d 1082 (2nd Dep’t 2010), the decedent’s widow alleged that she was entitled to a portion of her late husband’s estate, but the couple was married in New Jersey, which requires a marriage license for a marriage to be valid.

As in *Bernstein*, New York generally determines validity of marriage according to the laws where the marriage occurred. However, the Second Department looked to the restatement (second) of Conflict of Laws, which says that the “validity of a marriage will be determined by the local law of the state which,

with respect to the particular issue, has the most significant relationship to the spouses and the marriage" (restatement [Second] of Conflict of Laws Section 283 [1]).

Because the couple had only married in New Jersey because Islamic law requires a wedding to take place at the home of the bride's oldest male relative and moved to New York immediately following, the Second Department affirmed the lower court and decided to apply New York law, whereby the marriage was valid because it was solemnized.

The strong presumption in favor of marriage can also transcend distance with respect to time. In *Mackoff v. Bluemke-Mackoff*, 222 A.D.3d 67 (2nd Dep't 2023), two women disputed the date of their marriage, as the parties had participated in a Jewish wedding ceremony in 2005 but had only acquired a marriage license after the Marriage Equality Act was passed in 2011.

The court retroactively applied the Marriage Equality Act, finding that the couple had been validly married in 2005. These two cases are a testament to just how strong this presumption in favor of marriage is.

Being married in a religious ceremony creates a civil and religious marriage. These marriages fall under separate laws. A religious separation does not mean that the civil marriage is dissolved, and a divorce action is still necessary.

In *TI v. RI*, 83 Misc.3d 800 (Kings County, Sup. Ct. 2024), Justice Jeffrey S. Sunshine presided over a case in which the wife commenced a divorce action against the husband, who argued for the suit to be dismissed, as he had already procured a Get, or a Jewish writ of divorce.

The court asserted that the purpose of the civil action was to "adjudicate any secular obligations," which was independent from the religious status of the marriage.

The Get did not change the fact that they were still married according to New York law. Furthermore, one of the husband's justifications for obtaining the Get was that the rabbi who performed the ceremony was found to be unqualified to perform the marriage, which the husband argued had voided it.

However, the court reasoned that because the presumption in favor of marriage is so strong, this fact, which had not been uncovered until 10 years later, was insufficient to override the presumption.

The court also cited *Spalter*, recalling that not even a signed document that the marriage was not to be recognized under New York law was enough to override this presumption.

Outside the scope of this article is just how far the secular courts can go, in the face of the First Amendment doctrine demanding the separation of church and state, in determining that a license-less marriage is a valid marriage under the laws of New York, when a clergyman protests that there was no solemnization recognized by his church's denomination.

Such a case is currently working its way through the appellate courts.

Conclusion: Statutes Can Deceive

In conclusion, while DRL Section 72 may seem to set out a path for grandparents to obtain visitation with their grandchildren, the presumption in favor of the parents may, in reality, dash the hope that the grandparent visitation statute seems to provide.

Similarly, while DRL Section 13 requiring orderly registration of marriage licenses may seem to set out a path for the removal of ambiguities as to who is married and who is not under New York law, the presumption in favor of the validity of marriage may, in reality, override the hope that the marriage license statute seems to provide.

To return to HMS Pinafore, these statutes may look like “cream,” and taste like cream, but when applied, turn out to be “skim milk.” In each case, all that glitters is not gold, and the practitioner needs to be wary of misleading statutes in family law.



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