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COURT OF APPEALS

STATE OF NEW YORK

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MATTER OF GRANGER,

Respondent,  
-against

No. 72

MISERCOLA,

Appellant.

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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

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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.

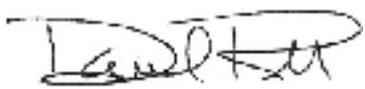
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C E R T I F I C A T I O N

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.



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