DOCKET NO.:	:SUPERIOR COURT
	: J.D. OF MIDDLESEX
VS.	:AT MIDDLETOWN
	:

DEFENDANT'S BRIEF IN SUPPORT OF THE DENIAL OF VISITATION

I. Introduction

The court has requested this brief to assist it in deciding whether the termination of visitation between the child and his great grandmother, to whom he may be bonded, constitutes real and substantial harm to the child. It does not.

II. Factual Position

The Intervening Grandmother (hereinafter "Smith") offered the testimony of herself, four fact witnesses and the Guardian Ad Litem. Smith's testimony centered around her relationship with the child, including the time during which she provided a home for the child in 2009. Smith testified that in January, 2010, the Defendant Father (hereinafter " Father") had joint physical custody of the child, and the child was with him at least half of the time. The remainder of the time, the child was with either the mother, or spent some time with Smith. Smith testified that she had reduced visitation with the child in the spring of 2010, and her final visit with the child was in either April or early May, 2010. The fact witnesses testimony centered around the relationship of Smith with the child, again, mainly in 2009. The Guardian Ad Litem testified that she believed the child had some relationship with Smith, that it would be in his best interest to visit

with Smith for a couple of hours per week, but that she could not state that the child would suffer any harm from the denial of visitation.

The Father offered the testimony of the Paternal Grandmother, with whom he and the child reside. The Paternal Grandmother testified that the child was on target developmentally and was not exhibiting any behavioral issues or problems, beyond that of a normal to year old.

The court took judicial notice of the decision in the underlying custody action, issued by Judge Jones.

III. Argument

The Father is a fit parent, as found by Judge Jones. The issue of third party visitation, against the objection of a fit parent is governed by Roth v. Weston, 259 Conn.202 789 A.2d 431 (2002). In Roth, the court found there are two requirements for a court to order visitation over the objections of a fit parent, "first the petition must contain specific, good faith allegation that the petitioner has a relationship with the child that is similar in nature to a parent-child relationship. The petition must also contain specific, good faith allegations that denial of visitation will cause real and significant harm to the child." Roth, at 234-235.

Smith alleges that she has a relationship with the child, and the Father conceded that at one point she did have such a relationship. However, that relationship began to diminish in January, 2010, as the Father and the Mother shared custody, and Smith began to play a role more consistent with the traditional idea of a Grandmother. Her last visit with the child was in the spring of 2010, approximately five or six months ago. At this point, her relationship to the child has diminished, and may no longer be similar in nature to a parent-child relationship.

Presuming that the court finds that the relationship exists, and is similar in nature to a parent-child relationship, the second prong of Roth then becomes relevant. Smith must prove, by clear and convincing evidence, that a denial of

visitation will cause real and significant harm to the child. Roth, at 235. Specifically, Smith must prove "a degree of harm analogous to the kind of harm contemplated by CGS 46b-120 and 46b-129, namely, that the child is neglected, uncared for or dependant. Denardo v.Bergamo, 272 Conn. 500, 863 A.2d 686 (2005). The decision by a fit parent brings with it the presumption that decision is in the best interest of the child. That presumption may only be overcome by clear and convincing evidence that real and substantial harm, similar to that which would compel the Department of Children and Families to bring a neglect petition for either emotional abuse or emotional neglect, would befall the child if visitation was not ordered.

In Connecticut, the Agency tasked with the protection of children is the Department of Children and Families (hereinafter "DCF"). DCF has generated operational definitions to guide them when investigating a case of suspected child abuse or neglect. Pursuant to Policy Number 34-2-7, Operational Definitions of Child Abuse and Neglect, "emotional abuse… is: act(s), statement(s), or threats, which have had, or are likely to have, an adverse impact on the child, and/or interferes with a child's positive emotional development." "Examples of emotional abuse include, but are not limited to: rejecting, degrading, isolating and/or victimizing a child by means of cruel, unusual, or excessive methods of discipline, or exposing the child to brutal or intimidating acts or statements."

Emotional neglect is defined as "the denial of proper care and attention, or failure to respond, to a child's affective needs by the person responsible for the child's health, welfare or care; by the person given access to the child; or by the person entrusted with the child's care which has an adverse impact on the child or seriously interferes with a child's positive emotional development" "Examples of emotional neglect include, but are not limited to: inappropriate expectations of the child given the child's developmental level, failure to provide the child with appropriate support, attention and affection, permitting the child to live under conditions, circumstances or associations injurious to his well-being including, but not limited to, the following: substance abuse by caregiver, which adversely impacts the child emotionally, psychiatric problem of the caregiver, which adversely impacts the child emotionally, and exposure to family violence which adversely impacts the child emotionally"

The allegations raised by Smith meet neither the definitions established by DCF for emotional neglect or abuse, nor the examples given thereof.

In the instant case, Smith has claimed that the denial of visitation will cause harm to the child, as he has a bonded relationship with her. She, however, offered no testimony to that effect. The only testimony regarding the possibility of harm came from the Guardian Ad Litem, who testified that she could not say that the child would be harmed by the denial of visits.

There are, to be sure, cases that hold that a child could be harmed by the denial of visits, however all are easily distinguishable. In the majority of the cases ordering visitation, the intervener had provided care, to the exclusion of others, for an extended period of time far in excess of that for which Smith provided care. In addition, in the cases ordering visits, the intervener offered proof of the harm that would come to the child, through either the testimony of the Guardian Ad Litem or some other expert.

In Bennet v Nixon, Superior Court, judicial district of New Haven, Docket No. FA 03-0484745 (February 27, 2004, Kenefick, J.) (04-CBAR-0696), the court held that the denial of visits with a child's psychological father justified the court intruding upon the family integrity. However, in that case, the intervener acted as the child's father from birth to the age of 5, provided for the child emotionally and financially all that time, and the child had "no other father-son relationship with any other person and knows no other as his father." That is not the instant case. Smith had acted a caregiver for the child, but acted in addition to the Mother and the Father. The child knows his Mother and Father, and recognizes them as such. In Bennet, the parent-child like relationship had existed for over five years. In the instant case, it existed for barely one year.

Additionally, in Bennet, the Intervener alleged that the child was manifesting such harm by "acting violently, fighting with other children, wetting himself after having been toilet trained, and by becoming withdrawn and depressed." Smith has made no such allegations here. Indeed, the testimony was that the child is not evidencing any behaviors that cause concern, despite the lack of visits for approximately six months.

In McCorison v McCorison, Superior Court, judicial district of Hartford, Docket No. FA 07-4032877 (May 13, 2009, Dyer, J.) (09-CBAR-1337) , the court

ordered visitation. In that case, the intervener was the child's only real father figure for approximately the first four years of the child's life. Contrast that with Smith' one year involvement as caretaker. In addition, in McCorison, the intervener produced the testimony of a licensed clinical psychologist. Smith produced no such testimony, nor requested any evaluations to be done. The only testimony regarding harm to the child was the Guardian Ad Litem, who testified that she could not say that the child would suffer harm.

In Smith v. Miller, Superior Court, judicial district of Hartford, Docket No. FA 06-4022351 (March 19, 2009, Dyer, J.) (09-CBAR-0816), the court ordered visitation after the intervener established that she had "acted in a parent like role and served at the primary caretaker…for a period of 3 years and 7 months." The court found that the intervener "was a better caretaker for the children than either of their parents and that she was the one constant person in the children's lives." Additionally, in Smith, the Guardian Ad Litem testified that the children would suffer real and substantial emotional harm from the loss of contact. In the instant case, the time period in which Smith acted as caregiver was drastically shorter, and her time was shared with the Mother and Father. Further, the GAL offered no such testimony, and in fact, testified that she could not say there would be any harm.

In each of the above cases the intervener had a longer period of time as caretaker then did Smith. More importantly, some form of evidence was introduced that the child would suffer harm. Smith offered no such testimony and offered no such evidence. The court cannot draw such a conclusion in the absence of such evidence and testimony.

Indeed, the facts of this case are much more in line with the cases denying vistiation. In Clements v. Jones, 71 Conn.App. 688, 803 A.2d 378 (2002), the court held that when a Family Relations Counselor testified that the child may suffer harm from the denial of visitation, that testimony did not establish by clear and convincing evidence, that harm would occur. Clements, at 696. See also Crockett v Pastore, 259 Conn. 240, 789 A.2d 453 (2002),(although important to maintain bonds, that allegation falls far short of the standard articulated in Roth).

In Nye v Rivard-Nye, Superior Court, judicial district of Tolland, Docket No. TTD-FA 06-4004274 (June 16, 2006, Swords, J.) (06-CBAR-1762), the

intervener offered evidence to support the finding of harm, alleging that the child had suffered a decline in self esteem and that the Guardian Ad Litem had some concerns about the parent's parenting skills. The court, in quoting Roth that, "interference can only be justified when it can be demonstrated that the is a compelling need to protect the child from harm", Roth at 228-229, denied the application, holding that despite the allegations and proof thereof, the "applicants have not adequately alleged that the child will suffer real and significant harm." Similarly in this case, Smith has alleged a general claim that the child could suffer harm if visitation was denied. However, Smith has offered no proof to substantiate that claim.

In Ruffino v. Bottass, et al., Superior Court, judicial district of Hartford, Docket No. FA 05-4019188 (April 11, 2006, Epstein, J.) (06-CBAR-1088), a case remarkably similar to this, the court denied visitation, holding:

"the court has found that there has been a sufficient allegation of a parent-like relationship between the applicants and the minor children that existed for the period of about one year-that is, from June 2004, through July 2005. The allegations with regard to the harm to the children, however, are no more than a plea to the court to intervene on the basis of the best interests of the children-that is, the contention that, in this "attachment phase" of their lives, because of their prior relationship with the grandparents, the children presently should have more access to their grandparents than father is presently permitting. The allegations do not amount to the high standard required by the *Roth* court."

In the instant case, Smith introduced evidence that she had a parent-child like relationship for approximately one year. She introduced no evidence that harm *would* befall the child, and simply claimed at the end of trial that the denial of visits could be the harm. As the cases clearly demonstrate, much more is required.

IV. Conclusion

The Father, having been found fit by Judge Jones, is entitled to a presumption that he is acting in his child's best interests in the denial of visitation. In order to rebut that presumption, Smith must prove, by clear and convincing evidence that

the child would suffer real and substantial emotional harm as a result of the denial of visits. Smith offered no testimony that there would be harm to the child resulting from the denial of visits. The Father, in light of this, moved for a directed finding, that Smith had failed to meet her heavy burden of clear and convincing evidence.

Smith claimed, at the end of trial, that the harm could be inferred from the termination of visits with a person to whom the child was bonded. The case law clearly establishes otherwise. The case law requires actual proof of the harm, and has only found such in cases where the intervener acted to the exclusion of other, for an extended period of time. Smith acted neither to the exclusion of other, nor for an extended period of time.

The Father, being a fit parent, is entitled to have his decision deferred to, in the absence of clear and convincing evidence of harm. As was written by the court in Ruffino, "it is that very principle that is so protected that the Connecticut Supreme Court has declared that a very high standard must be met so as to appropriately protect the father's right to not have to defend his decisions in a court of law." Smith has clearly failed to meet that burden.

The Defendant Father,

By_____
Thomas Babson Kane
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His Attorneys

CERTIFICATION

This is to certify that a copy of the foregoing was faxed to all counsel of record this 1st day of November, 20 , to wit:

_____

Thomas Babson Kane
Commissioner of the Superior Court