

Children's Law Center of Indiana



Guardianship/Third Party Custody

03/12/2009

In **In Re Guardianship of A.L.C.**, 902 N.E.2d 343 (Ind. Ct. App. 2009), the Court affirmed in part, reversed in part, and remanded with instructions, the trial court's judgment awarding guardianship of the child and his estate and grandparent visitation with the child. Mother and Father executed a paternity affidavit the day after the child was born out of wedlock on August 27, 2005. Prior to Mother's death in a single-car accident on May 23, 2007: Mother and Father lived with the child in a house purchased by Paternal Grandparents; Paternal Grandparents provided the couple with money; Mother was addicted to alcohol; Father had a criminal record and used illegal drugs; and Paternal Grandparents, Maternal Grandmother, and Maternal Great Grandmother provided child care for the child. The trial court granted temporary guardianship of the child and his estate to Maternal Grandfather and Step-Grandmother, granted permanent guardianship of the child to Maternal Grandmother and Step-Grandfather, ordered that they be joined by Maternal Grandfather as guardians of the child's estate, and granted extensive visitation with the child to Paternal Grandparents along with designating them as supervisors of Father's parenting time. More facts are included in the following discussion.

Paternal Grandparents are bound by the temporary guardianship orders and cannot challenge them on appeal, inasmuch as they did not intervene until after the orders were issued. *Id.* at 351, 359. The Court opined: (1) an intervenor is treated as if it were an original party and has equal standing with the parties; (2) but an intervenor is not permitted to relitigate matters already determined in the case; and (3) a party's intervention after judgment binds the intervenor to all prior orders and judgments in the case. *Id.* at 351 (citations omitted). The Court noted that, here: (1) Paternal Grandparents were served with the initial Emergency Petition, but did not respond, or seek to become parties to the proceedings, until much later; (2) the trial court entered its order granting the Emergency Petition (appointing Maternal Grandfather and Step-Grandmother as temporary guardians) on May 25, 2007, the date the petition was filed; (3) Maternal Grandmother and Maternal Grandfather filed the Amended Emergency Petition on June 12; (4) at the July 5 hearing, the trial court found "more than sufficient evidence to continue" the temporary guardianship as originally ordered; (5) but, at the hearing Maternal Grandmother and Step-Grandfather, Maternal Grandfather and Step-Grandmother, and Father had agreed that Maternal Grandmother and Step-Grandfather should be appointed temporary guardians over the child and that Maternal Grandmother and Step-Grandfather, and Maternal Grandfather should be appointed temporary guardians over the child's estate; (6) at the conclusion of the hearing, the trial court continued the temporary guardianship in accordance with the parties' agreement; and (7) Paternal Grandparents first asked to intervene on August 14, 2007. *Id.*

Paternal Grandparents failed to show that the trial court's findings were not supported by the evidence or that the trial court's conclusions were not supported by the findings, and

Paternal Grandparents are not “entitled” to be appointed co-guardians as a matter of law by virtue of Father’s Nomination requesting that they be appointed guardians of the child and his estate, inasmuch as the best interest of the child is the overriding factor the trial court must consider when appointing a guardian. *Id.* at 355, 359-60. The Court observed that IC 29-3-5-5(a)(4), which, here, gives Paternal Grandparents priority consideration because of Father’s written Nomination of them to be the guardians, was applicable to the present case, and to the extent the trial court found to the contrary, it abused its discretion because the evidence does not support that finding. *Id.* at 353. Citing to IC 29-3-5-4(7), -5(b), the Court found that, while Paternal Grandparents fell within one of the priority categories in IC 29-3-5-5(a) entitling them to priority consideration for appointment as the child’s guardian, that status did not entitle them to the appointment, inasmuch as the best interest of the child is the overriding factor the trial court must consider when appointing a guardian. (IC 20-3-5-5(b) provides: “With respect to persons having equal priority, the court shall select the person it considers best qualified to serve as guardian. The court, acting in the best interest of the incapacitated person or minor, may pass over a person having priority and appoint a person having a lower priority or no priority under this section.”) *Id.* at 353-54.

The trial court abused its discretion when it awarded Paternal Grandparents visitation according to the Indiana Parenting Time Guidelines. *Id.* at 359, 360. The Court agreed with Maternal Grandparents’ contention that the Grandparent Visitation Act (GVA) does not contemplate grandparent visitation to be as extensive as visitation under the Indiana Parenting Time Guidelines (IPTG). *Id.* at 357. The Court opined: (1) this court has held that the GVA contemplated only occasional, temporary visitation that does not substantially infringe on a parent’s fundamental right to control the upbringing, education, and religious training of their children; (2) this court has held that the trial court abused its discretion when it ordered visitation to a grandparent nearly coextensive with the visitation set out in the IPTG; (3) the crux of the GVA is to protect the best interest of the child; (4) the GVA provides the exclusive method for grandparents to seek visitation; (5) there is no longer a common law right for grandparents to seek visitation; and (6) the GVA and the cases explaining it apply here. *Id.* at 358 (citations omitted). The Court noted that, here: (1) the child is only three years old; (2) he is under the guardianship of Maternal Grandmother and Step-Grandfather, one of three sets of grandparents who wish to be involved in his life; (3) in its Permanent Guardianship Order, the trial court gave Paternal Grandparents visitation equal to that of a non-custodial parent as well as right of first refusal for incidental child care, which could effectively exclude the child’s third set of grandparents from having a meaningful amount of time with him; (4) the Permanent Guardianship Order did not consider these factors when setting the visitation schedule for Paternal Grandparents; and (5) the trial court made no finding that the extensive visitation award was in the child’s best interest. The Court reversed the part of the Permanent Guardianship Order setting out Paternal Grandparents’ visitation schedule and remanded to the trial court with instructions to enter more specific findings and conclusions supporting the trial court’s award of visitation to Paternal Grandparents in accordance with this opinion, without a hearing. Specifically, the Court directed that the trial court must consider and make findings on (1) the factors set out in *McCune v. Frey*, 783 N.E.2d 752, 755-57 (Ind. Ct. App. 2003), to the extent applicable; (2) the particular circumstances of this child, including but not limited to the fact that there are three sets of grandparents and a noncustodial father involved in his life; and (3) whether the visitation schedule of Paternal Grandparents determined on remand is in the child’s best interest. *Id.* at 358-60.