

# Children's Law Center of Indiana



## Custody and Parenting Time (Grandparent Visitation)

11/24/14

In **In Re Visitation of H.B.**, 21 N.E.3d 867 (Ind. Ct. App. 2014), the Court reversed the trial court's order granting the maternal grandparents (Grandparents) court ordered visitation with the six-year-old child and restored Father's discretion to determine the level of Grandparents' visitation in accordance with Father's parental rights and the child's best interests. *Id.* at 873. The child was born in June 2008 to unmarried parents. Mother and the child occasionally lived with Grandparents. Although Mother initially had custody of the child, an Illinois court modified custody in March 2012 due to Mother's alcohol abuse and instability. Father was awarded sole custody of the child, and Mother was awarded visitation. In August 2012, Mother's visitation was modified to visitation supervised by Father or the child's paternal grandparents on the first, second, and third Sundays of each month from 3:00 p.m. until 5:00 p.m. at a restaurant. Grandparents visited with the child once per month during Mother's visitation. Grandparents also attended the child's sporting events, and Father allowed the child to attend a picnic and a birthday party with Grandparents. In July of 2013, Grandparents filed a petition for visitation with the child pursuant to IC 31-17-5. After a hearing, the trial court granted Grandparents' petition, and ordered Father to permit Grandparents to have visitation with the child: (1) the second weekend of each month from 6:00 p.m. on Friday until 3:00 p.m. on Sunday; (2) for two overnights between December 26 and December 31; and (3) for one five-day period during the child's summer break. The trial also instructed Father to permit Grandparents to call the child at least gone time per week at a reasonable time. Father appealed, and, in a memorandum decision, the Court of Appeals remanded the case to the trial court to enter an order that expressly met the requirements enumerated by the Indiana Supreme Court in **In Re M.L.B.**, 983 N.E.2d 583, 588 (Ind. 2013). These requirements are: (1) a presumption that a fit parent's decision about grandparent visitation is in the child's best interests (thus placing the *burden* of proof on the petitioning grandparents); (2) the "special weight" that must therefore be given to a fit parent's decision regarding nonparental visitation (thus establishing a heightened *standard* of proof by which a grandparent must rebut the presumption); (3) "some weight" given to whether a parent has agreed to some visitation or denied it entirely (since a denial means the very *existence* of a child-grandparent relationship is at stake, while the question otherwise is merely *how much* visitation is appropriate); and (4) whether the petitioning grandparent has established that visitation is in the child's best interests. **M.L.B.** at 586 (emphasis in opinion). **H.B.** at 871.

On remand, the trial court entered findings and conclusions, which included: (1) the child and Mother lived with Grandparents for approximately two and one-half years after the child's birth; (2) Pursuant to the Illinois order, Mother receives only six hours of contact with the child at a McDonald's restaurant on the west side of Evansville, two hours at a time and on three Sundays per month; Grandparents previously attended one two hour period per month; (3) *Father allowed no time to Grandparents for them to visit with the child outside of his supervision and control, and, without the coercive intervention of the court, there will be no other time allowed by Father to Grandparents*; (4) the law presumes that a fit parent's decision about grandparent visitation is in the child's best interest. *That presumption in this case is overcome by evidence of the close personal relationship between the child and Grandparents, and the fact they will receive no grandparent visitation with her if the matter is left in [F]ather's control*; (5) the court has considered the "special weight" that must be given to a fit parent's decision regarding non-parental visitation, but *finds the evidence overcomes and rebuts the presumption that [F]ather should have total control over this matter when [M]other is permitted no unsupervised parenting time by the Illinois court's order, and [F]ather will permit no unsupervised visitation to Grandparents absent an order of this court*; (6) the evidence shows that the child lived with Grandparents for an extended period of time following her birth and has a close, personal relationship with Grandparents and their family that regularly congregates at the family farm on the weekends; (7) *the entry of this order assures that [the child] may maintain some regular contact with [M]other's family and they with her. Otherwise, the evidence supports a finding there will be none.* *Id.* at 870 (emphasis in opinion).

**The Court held that the "scant evidentiary showing" did not overcome a fit parent's decision about Grandparents' visitation, and was insufficient to vitiate Father's constitutional right to direct his child's upbringing.** *Id.* at 873. The Court agreed with Father's assertion that there was no evidence to support the trial court's finding that Father would entirely deny Grandparents visitation absent a court order. *Id.* at 871. The Court noted that Father testified, and Grandparents did not refute, that he had encouraged Grandparents to attend the child's extracurricular activities at their convenience and that he would "not have a problem" with Grandparents phoning and talking to the child. *Id.* at 872. The Court also noted Grandparents testified that Father had accommodated their request to spend extra time with the child after a soccer game to celebrate Mother's birthday, but they had not asked Father for other visitation with the child. *Id.* The Court said that neither Father's words nor his actions demonstrated that he was unwilling to accommodate Grandparents' visitation requests absent a court order. *Id.*

Although Grandparents asserted that Father refused to respond to text messages they had sent to him, the Court found that Grandparents' assessment of the record was inaccurate. *Id.* The Court found that the undisputed evidence showed that Father did not respond to one text message from Grandparents because that text message was lost in the shuffle of similar messages from Mother's family. *Id.* at 873. The Court noted that, while Grandparents testified that Father also did not return a phone call, they did not testify that they had left him a message which would have made him aware that they had called and that he should return their call. *Id.*