Grandparent Visitation

1/13/15

In **In Re Visitation of L-A.D.W.**, 24 N.E.3d 500 (Ind. Ct. App. 2015), the Court concluded that the trial did not err in granting visitation to Grandparents, who were the parents of the child's deceased Mother. Id. at 502-03. The Court found that the trial court abused its discretion in the amount of visitation it awarded. Id. at 503. The Court affirmed the trial court's order granting grandparent visitation. Id. The Court reversed and remanded for the trial court establish a visitation schedule that allows "occasional, temporary visitation that does not substantially infringe on" Father's right to control the child's "upbringing, education, and religious training." Id. at 516. Mother and Father married in 2002 and had one child together, who was born in January 2005. Mother is Grandparents' only child, and the child is Grandparents' only grandchild. After the child was born, Grandparents lived with Parents and took care of the child while Mother continued her work as a pediatric dentist and Father completed his medical school residency. When the child was a year old, Mother and Father moved to Evansville, Indiana, an hour away from Grandparents' home in Madisonville, Kentucky. At some point, Grandparents bought a home in Evansville, and split their time between Madisonville and seeing Mother and the child in Evansville. Mother opened a new pediatric dentistry practice in Evansville, where she worked two to four days per week. Grandparents continued to care for the child during the days when Mother was at work. When the child began attending pre-school, Grandparents fixed the child's breakfast, dressed her, and transported her to school. Throughout the child's early childhood, Mother and Grandparents served as the child's primary caregivers.

In late July 2010, when the child was five years old, Mother was diagnosed with stage four colon cancer, and Grandparents moved into Mother's and Father's home to take care of the child. Grandparents fixed the child's breakfast, transported her to and from school, read to her at night, did the family's laundry and chores, and cooked for the family. Mother received multiple treatments from 2010 to 2013, some of which were out of town. Grandparents and the child went with Mother for her out of town treatments. The child's teachers sent her school assignments with them, and Grandmother, a licensed teacher, ensured that the child completed her homework.

In early 2013, Mother filed for dissolution of her marriage from Father. At the provisional hearing, Mother testified that Father was an "absent" and "non[-]participating parent", partly due to his heavy work schedule, but also due to his activities, which included cycling, flying his airplane, going to the gym, and playing video games. Father admitted that he was not always able to attend the child's extracurricular activities because of work. The trial court granted Mother and Father temporary joint legal custody and Mother temporary primary physical

custody. Mother's health worsened shortly thereafter, and she asked Grandparents to petition for grandparent visitation with the child if she died. She also included in her will that Grandparents should seek visitation rights and, if necessary, be appointed guardians of the child. On April 9, 2013, Mother's attorney contacted Father's attorney and told him that Grandparents planned to petition for visitation, but they would forego a legal petition if Father agreed to visitation without a court order. Father did not respond.

Mother died on April 17, 2013, and Grandparents petitioned for grandparent visitation with the child the same day. A few days prior to Mother's death, Father contacted a mental health counselor, Laura Ellsworth (Ellsworth), to help the child deal with her grief and the transition to his custody. Based on Ellsworth's advice, Father arranged for the child to meet with another therapist for counseling, and the child met with the therapist approximately every three to four weeks thereafter. Father also asked Ellsworth to determine the child's best interests in terms of grandparent visitation. Ellsworth observed that the child had strong attachments with both Father and Grandparents and felt that it was important for Grandparents to maintain a relationship with the child.

On April 30, 2013, Ellsworth recommended a temporary grandparent visitation schedule for Father and Grandparents to follow until the child returned to school in the fall. The schedule provided for Grandparents to have visitation with the child: (1) on Tuesdays from 3:00 p.m. until 6:00 p.m. until the end of the school year; (2) one Saturday per month from 7:00 a.m. to 8:00 p.m.; and (3) for one five day consecutive period during the summer. She also encouraged Grandparents to attend the child's swim meets and other spectator activities. Father agreed to follow Ellsworth's recommendations and sent the proposed schedule to Grandparents' attorney. In the months that followed, Father did not allow Grandparents visitation on any Tuesdays before the school year ended or on any Saturdays, but he did allow Grandparents visitation for five days during the summer, which was divided into two visits because the child was suffering from anxiety at the thought of leaving Father for five days in a row. Father also took the child to meet Grandparents for lunch on Mother's Day, on a day in June, and on a day in September, allowed the child to spend one Sunday with Grandparents, and allowed Grandparents to see the child at her sporting events, which Grandparents attended. Grandparents also became acquainted with one of the child's summer nannies, Jamie Redford (Redford), at the child's swim practice, and Father gave permission for Redford and the child to have lunch with Grandparents once. Later that night, Father asked Redford to come to his house, where he told her that Grandparents were not being nice to her for any reason other than to get information for Grandparents' court case. Redford did not agree with Father, and he continued the conversation later that night for over an hour by telephone. Father also had his lawyer write to Grandparents' lawyer asking them not to communicate with the child through third parties. For the rest of the summer, Grandparents continued to speak with Redford, but did not communicate with her about the child. Father and the child continued to meet with Ellsworth and also met with Dr. Rebecca Luzio (Dr. Luzio), the expert whom Grandparents hired for the visitation case. Ellsworth and Dr. Luzio conducted two joint sessions with Father and Grandparents, which were unsuccessful. During the first session, Grandfather became upset with Father, got off the couch and started towards Father, but Ellsworth and Dr. Luzio rose and stood between Father and Grandfather. Dr.

Luzio recommended follow-up grief and anger management counseling to Grandfather, which he completed.

The trial court held a hearing on Grandparents' petition for visitation on September 27, 2013. Father, Grandparents, Redford, Dr. Luzio, and Ellsworth testified. Ellsworth recommended that Father be permitted the right to determine the child's schedule of visitation with Grandparents. Dr. Luzio had "grave concern[s]" about Father's willingness to provide future grandparent visitation as he had allowed so little visitation, and noted that, on occasion, Father had offered visitation on the condition that Grandparents first answer questions that were unrelated to the child and then withdrawn his offer if they did not answer the questions the way he wanted. Even though she considered Father a fit parent, Dr. Luzio recommended that the trial court impose a set schedule for Grandparents' visitation. Redford testified that: (1) she had observed the child's interactions with Grandparents at swim meets over the summer; (2) early in the summer, the child was "very excited" to see Grandparents, but toward the end of the summer, it "would be more like she did [not] even want to talk to them"; (3) the child would get upset, believing that she would get in trouble if she was around Grandparents without Father; (4) Father had told her that he wanted to terminate the child's relationship with Grandparents. Grandmother testified that visitation with the child would have to be court ordered because Father had not allowed them visitation despite Ellsworth's schedule. Grandfather testified that he "did not" and "will not" confront Father about anything around the child and that he would be able to visit the child without expressing his sentiments about Father. Father testified that he had proposed Ellsworth's schedule to Grandparents, but had not followed it because Grandparents had never agreed to the arrangement; nevertheless, he had allowed Grandparents significant time with the child. Father testified about his concerns with taking the child to visit Grandparents, but admitted that the child needed time to grieve, and needed to spend time with Grandparents in order to do so.

On January 22, 2014, the trial court entered an order granting Grandparents' petition. The trial court found that Father was a fit parent, concluded it was in the child's best interests to continue her relationship with Grandparents, and determined that Grandparents had rebutted the presumption that Father's decisions were in the child's best interests. The Court ordered visitation for Grandparents: (1) one overnight on one weekend during even-numbered months; (2) two overnights on one weekend during odd-numbered months; (3) every Tuesday during the school year until 7:00 p.m. and during the summer from 10:00 a.m. to 7:00 p.m.; (4) eight hours on Mother's birthday; (5) four hours on Grandparents' birthdays; (6) one overnight during the week of the child's birthday; and (6) five consecutive days during the summer. Father appealed.

The Court determined that the trial court did not err in concluding that it had granted Father's decisions special weight. Id. at 511. Citing Megyese v. Woods, 808 N.E.2d 1208, 1213 (Ind. Ct. App. 2004), the Court said that, in making the determination on whether grandparent visitation is in the child's best interests, the trial court is to "presume that a fit parent's decision is in the best interests of the child," but that presumption is rebuttable, and the court must also give "special weight" to a parent's decision to deny or limit visitation and "some weight" to the fact that a parent has agreed to some visitation. L-A.D.W. at 508. Citing In Re K.I., 903 N.E.2d 453, 462 (Ind. 2009), the Court noted the following four factors that a trial court must address when ruling on a petition for grandparent visitation: (1) the presumption that a fit parent acts in his or her child's best interests; (2) the special weight that must be given to a fit parents' decision

to deny or limit visitation; (3) whether the parent has denied visitation or simply limited visitation; and (4) whether the grandparent has established that visitation is in the child's best interests. L-A.D.W. at 508. Father claimed that the trial court did not actually afford his decision any special weight because it discounted Father's concerns that (1) Grandparents had undermined and were continuing to undermine his relationship with the child and (2) it was not in the child's best interests to expose her to Grandparents' hostility towards him. The Court said that, in light of the evidence supporting the trial court's finding that Grandparents had not undermined Father, the trial court's finding was not erroneous. Id. at 510. Father also argued that the trial court did not sufficiently address Grandparents' anger towards him in its findings and conclusions, citing evidence that the child expressed her preference to Dr. Luzio to see Grandparents less frequently and for shorter periods of time. Father claimed that this evidence demonstrated that the child was aware of Grandparents' hostility towards him. The Court said that this argument was merely an invitation to reweigh the evidence. Id. In considering whether the trial court's findings supported its conclusion that it gave Father's decision on Grandparents' decisions special weight, the Court stated that Father misconstrued the "special weight" requirement. Id. at 511. Quoting Ramsey v. Ramsey, 863 N.E. 2d 1232, 1239 (Ind. Ct. App. 2007), the Court said it had previously explained that "the requirement that the trial court afford the parent's decision special weight deals with the trial court's process of weighing the evidence." L-A.D.W. at 511. Quoting Hicks v. Larson, 884 N.E.2d 869, 875 (Ind. Ct. App. 2008), the Court said that the special weight requirement " 'does not require a trial court to take at face value any explanation given by a parent,' " and the trial court is not required to accept a parent's reasons as true. Citing Spaulding v. Williams, 793 N.E.2d 252, 260 (Ind. Ct. App. 2003), *trans. denied*, the Court said that, as long as a trial court affords a parent's decision regarding visitation special weight, the trial court may still find that a parent's reasons for denying visitation are not credible or that other factors in the record outweigh the parent's decision. L-A.D.W. at 511.

The Court found that the trial court afforded appropriate weight to the fact that Father had allowed some visitation in the past. Id. at 514. Although Father argued that the trial court's finding that he did not follow Ellsworth's visitation schedule was erroneous, the Court said Father could not contradict this finding. Id. at 512. The Court concluded that sufficient evidence supported the trial court's finding that Father did not comply with Ellsworth's recommendations. Id. at 513. Father also argued that the trial court's conclusion that he would deny Grandparents visitation absent a court order was not supported by the evidence and findings. The Court noted Redford's testimony that Father told her he intended to terminate Grandparents' relationship with the child, and stated that it was not the Court's place to reweigh evidence or judge witness credibility. Id. The Court concluded the trial court's finding that Father would deny visitation absent a court order was not clearly erroneous. Id. In addition, Father argued that the trial court should have granted weight to the fact that in the past he limited, rather than denied visitation. The Court said that the trial court never found that Father had previously denied visitation completely; therefore, the Court could not conclude that the trial court did not give some weight to the fact that Father had allowed visitation. Id. The Court noted that the trial court expressly concluded that the existence of a relationship between Grandparents and the child was at stake because the evidence demonstrated that, without a court order, Father would likely deny Grandparents visitation. Id. at 514.

The Court concluded the trial court did not err in determining that Grandparents had rebutted the presumption that Father's decisions regarding Grandparents' visitation were in the child's best interests. Id. at 514. In addressing whether Grandparents rebutted the presumption that Father's decisions on Grandparents' visitation were in the child's best interests, the Court looked to Spaulding v. Williams, 793 N.E.2d 252, 261 (Ind. Ct. App. 2003), *trans. denied*, an analogous case to the instant case. L-A.D.W. at 514. In Spaulding, the grandparents had been an important part of the child's daily life prior to the death of the child's mother, after the mother's death, the father decided to terminate the grandparents' relationship with the child, and the trial court held that the grandparents had rebutted the presumption that the father's decisions on visitation were in the child's best interests. L-A.D.W. at 514. The Court observed that, in the instant case, it was undisputed that a relationship with Grandparents was in the child's best interests and the trial court concluded "as a matter of law that absent a Court order, the Father [would] not consistently allow for such regular and meaningful contact." Id. The Court observed that, as in Spaulding, there was evidence to support the trial court's conclusion that Father's intention to deny the child a relationship with Grandparents was not in her best interests. L-A.D.W. at 514.

The Court concluded that the trial court abused its discretion in its determination of the amount of visitation Grandparents would receive. Id. at 516. Father argued that the trial court abused its discretion in the amount of grandparent visitation ordered. Quoting Visitation of M.L.B. 983 N.E.2d 583, 586 (Ind. 2013), the Court noted the Supreme Court has previously held that "although the amount of visitation is left to the sound discretion of the trial court, the Grandparent Visitation Act contemplates only occasional, temporary visitation that does not substantially infringe on a parent's fundamental right to control the upbringing, education, and religious training of [his or her] children." L-A.D.W. at 514-15. Citing Hoeing v. Williams, 880 N.E.2d 1217, 1221 (Ind. Ct. App. 2008), the Court said that, as a general rule, it has previously held that it is *prima facie* error to grant a grandparent visitation rights nearly equivalent to those of a non-custodial parent. L-A.D.W. at 515. The Court noted that in Hoeing, the Court found that grandparent visitation of ninety-six days per year was excessive, and in Swartz v. Swartz, 720 N.E.2d 1219, 1222 (Ind. Ct. App. 1999), the Court held that visitation on alternating weekends, where the child would be alternating between four different households and would live outside the mother's home seventy-three days per year was an abuse of the trial court's discretion. L-A.D.W. at 515. The Court found that, in the instant case, the visitation ordered for the child with Grandparents was approximately seventy-nine days per year and was very similar to the parenting time schedule a non-custodial parent would have. Id. at 515. The Court remanded for the trial court to establish a visitation schedule that allowed Grandparents "occasional, temporary visitation that does not substantially infringe on" Father's right to control [the child's] "upbringing, education, and religious training." L-A.D.W. at 516.