Children's Law Center of Indiana

Custody and Parenting Time

3/7/13

In **In Re Visitation of M.L.B**, 983 N.E.2d 583 (Ind. 2013), a grandparent visitation case, the Indiana Supreme Court remanded the case for the trial court to enter new findings and conclusions consistent with the opinion. The child was born in 2004, and his parents never married. Mother and Father ended their relationship a few months after the child's birth. At times, Mother has had a restraining order against Father. Paternity and support were established in 2008, but Father did not pursue parenting time and has had essentially no contact with the child since 2007. Paternal grandfather (Grandfather) visited the newborn child at the hospital and saw him two or three times a month through the child's infancy. Mother generally allowed the child to have frequent contact with Grandfather and his wife and to attend paternal extended family functions, typically for a few hours in the afternoon. Mother married Stepfather in 2005, and, beginning in 2007, Mother required that Father not be present as a condition of the visit. The voluntary grandparent visitation arrangement continued uneventfully through Christmas 2009. In early 2010, after Stepfather initiated a step-parent adoption of the child, Mother curtailed Grandfather's visits. Father contested the adoption, and Grandfather intervened in the proceedings to petition for a grandparent visitation order.

At the consolidated hearing on both the visitation and adoption petitions, Mother testified that the child gets along well with Grandfather and the extended paternal family, and that she had no objection to allowing continued visitation between the child and Grandfather. The trial court granted Grandfather visitation one weekend per month from Friday evening to Sunday evening; a "summer family vacation of up to ten (10) days duration" in lieu of that month's regular weekend; ten hour visits for Easter, Thanksgiving, and Christmas; and a ten hour visit within the week of the child's birthday. The order also imposed no restrictions on Father's contact with the child, even though his parental rights were terminated by the order granting Stepfather's adoption petition. Because the visitation order had been issued first, it survived the termination of Father's rights pursuant to IC 31-17-5-9. Mother appealed the visitation order, arguing that it violated her fundamental parental rights. The Court of Appeals affirmed, and the Supreme Court granted transfer.

The Court opined that, in grandparent visitation cases, the trial court must address four factors, all of which must be included in the court's findings of fact and conclusions of law.

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Id. at 586. The Court applied the two-tiered Indiana Trial Rule 52 standard of review because the Grandparent Visitation Act requires specific findings of fact and conclusions of law pursuant to IC 31-17-5-6. Id. at 585. The Court first determined whether the evidence supports the findings, and then whether the findings support the judgment. Id., citing In Re K.I., 903 N.E.2d 453, 457 (Ind. 2009). The Court sets aside the findings of fact only if they are "clearly erroneous," deferring to the trial court's superior opportunity "to judge the credibility of the witnesses." K.I. at 457. M.L.B. at 585. The Court noted that the United States Supreme Court addressed the tension between emerging grandparent visitation rights and the fundamental right of fit parents to direct their children's upbringing in Troxel v. Granville, 530 U.S. 57 (2000). M.L.B. at 586. The Court noted Troxel's acknowledgement that because "grandparents and other relatives undertake duties of a parental nature in many households," children's relationships with grandparents may deserve protection. Troxel at 64. M.L.B. at 586. The Court observed that Troxel broadly agreed that natural parents have a fundamental constitutional right to direct their children's upbringing without undue governmental interference, and that a child's best interests do not necessarily override that parental right. M.L.B. at 586. The Court said that the Indiana Court of Appeals distilled the four factors which a grandparent visitation order "should address":

(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.

(Emphasis added by Court) M.L.B. at 586, citing McCune v. Frey, 783 N.E.2d 752, 757-59 (Ind. Ct. App. 2003). The Indiana Supreme Court approved the four McCune factors, and took the additional step of declaring that a grandparent visitation order "*must* address" those factors in its findings and conclusions. M.L.B. at 586, citing In Re K.I., 903 N.E.2d at 462 (emphasis added by Court).

The Court opined that, despite the trial court's ample "best interests" findings, the lack of findings on the other three factors, both standing alone and as compounded by the extensive visitation awarded to Grandfather without those necessary findings, violated Mother's fundamental right to direct the child's upbringing. Id. at 588. The Court, applying the principles of Troxel to this case, observed that the findings are incomplete and that the order was not constitutionally permissible. Id. at 586-87. The Court observed that the first three required factors implement the constitutionally protected right of fit parents to make child rearing decisions, and reflect the significant burden of proof grandparents must carry to override those decisions. Id. at 587. The Court said that the order is insufficient as to all three factors,

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noting that none of the findings give any indication that the trial court recognized the "presumption that a fit parent acts in his or her child's best interests," or gave 'special weight…to a fit parent's decision to deny or limit visitation", quoting In Re K.I., 903 N.E.2d at 462. M.L.B. at 587. The Court also addressed the third factor in light of the extensive amount of visitation awarded, namely, whether the parent has denied visitation or has simply limited visitation. Id. The Court said that this factor defines what interest of the child's is at stake. Id. The Court explained that the case for judicial intervention is strengthened if visitation has been denied unreasonably, because the stakes are whether the child will have *any* relationship with the grandparents (emphasis added by Court). Id. The Court observed that, when a parent has already offered visitation voluntarily, albeit within reasonable limits, it is not the existence of a relationship at stake, but only *on whose terms* it will be (emphasis added by Court). Id. (emphasis added by Court). The Court said that, in the second situation, a grandparent visitation order particularly implicates the danger of "infring[ing] on the fundamental right of parents to make child rearing decisions simply because [a court] believes a 'better decision could be made." M.L.B. at 587, quoting Troxel, 530 U.S. at 72-73 (plurality opinion).

The Court noted that the trial court found a "denial" of visitation in the months leading up to the trial, and the trial court's conclusion that Mother curtailed visitation after the adoption was filed in an effort "to end the relationship" between the child and Grandfather. Id. The Court observed it is also undisputed that, for several years leading up to that denial, Mother had merely limited the amount of visitation, consenting to regular, meaningful visitation between the child and Grandfather, but rarely if ever overnight, and never for any extended trips out of state. Id. The Court said that, while Mother's denial of visitation is certainly relevant, under Troxel, so is the parties' earlier pattern, because it suggests an amount of visitation that might be awarded without unduly interfering in Mother's fundamental right to direct the child's upbringing. M.L.B. at 587. The Court observed that, though the trial court was within its discretion to order some degree of visitation to ensure that the child's relationship with Grandfather would continue, the amount of visitation awarded far exceeded the parties' earlier pattern and the visitation order gave no consideration to Mother's previously imposed "limit" that Father not be present during grandparent visits, a condition that seems particularly important now that Stepfather's adoption of the child is complete so that his rights as a legal parent must also be protected. Id. The Court concluded that ordering such extensive visitation, without the required findings to indicate why Mother's prior limitations on duration and Father's presence were unreasonable, or how the sudden increase in visitation would affect the child, risked exactly what Troxel, 530 U.S. at 72-73 forbids. M.L.B. at 587-88. With regard to the fourth factor, that visitation is in the child's best interests, the Court opined that the trial court's findings are amply supported by the evidence, including that the child: (1) has had a good and consistent relationship with Grandfather and paternal extended family for his entire lifetime; (2) often sees Grandfather and paternal extended family two to four times per month and for major holidays; (3) calls grandfather "Grandpa" and Grandfather's wife "Grandma," and has a loving, positive relationship with them. Id. at 588.

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The Court concluded that the grandparent visitation order is voidable and requires remand to correct its defects through new findings and conclusions without hearing new evidence. Id. at 589. The Court noted that In Re K.I., 903 N.E.2d at 462-63 and several Court of Appeals decisions, including McCune, 783 N.E.2d at 759-60, have concluded that the remedy is a remand for new findings and conclusions based upon the existing record. M.L.B. at 588 (multiple citations omitted).

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