

# Children's Law Center of Indiana



## Custody and Parenting Time

5/17/12

In **Wilder-Newland v. Kessinger**, 967 N.E.2d 558 (Ind. Ct. App. 2012), the Court affirmed the trial court order denying grandparent visitation, where the trial court had concluded the denial was in the best interests of the children and consistent with the fit parent's decision, and that Paternal Grandmother had failed to satisfy her burden of proof.

In 2009, Father attacked Mother with a knife and stabbed her in the face. Father was arrested and was granted supervised visitation with his three children, although the middle child was alleged to not be Father's biological child. Paternal Grandmother attended these supervised visits to see her grandchildren. Father no longer had visitation after he was convicted and sentenced to concurrent sentences of six years for Class C felony battery with a deadly weapon, and four years for Class D felony criminal recklessness with a deadly weapon. In April 2010, after Father's visitation ceased, Mother and Father were divorced. Paternal Grandmother filed a petition to establish grandparent visitation in the divorce proceedings that was not addressed in the decree of dissolution. Paternal Grandmother filed another petition to establish grandparent visitation a year later. The trial court held a hearing on Paternal Grandmother's petition in July 2011, and subsequently denied the grandparent visitation. On appeal, Paternal Grandmother argued that the trial court erred in denying her visitation with her grandchildren. More specifically, Paternal Grandmother argued that the trial court erred in completely denying her grandparent visitation with her grandchildren, rather than limiting visitation, as Mother expressed an opinion at the hearing indicating Mother would allow limited visitation.

**The Court affirmed the trial court's conclusion that denial of grandparent visitation was in the best interests of the children, finding that the evidence presented at the hearing supported the trial court's findings, and the trial court's findings supported its judgment.**

Id. at 560. The Court first noted its standard of review, which in this case is a two tiered standard of review. Id. "“In applying a two tiered standard of review, we first determine whether the evidence supports the findings and then whether the findings support the judgment.”” Id. (citing Indiana Trial Rule 52(A)). Furthermore, the Court stated that it gives substantial deference to trial courts in matters involving family law. Wilder-Newland, 967 N.E.2d at 560. The Court found that there was evidence that the children had difficulty adjusting to visitation in the past, and that Mother was concerned that they would struggle with the adjustment to visitation again. Id. This evidence supported the trial court's finding that “[Mother] voiced concerns about the effects on the children following contact with [Grandmother].”” Id. There was also evidence that there may be risks to the children in allowing visitation with Paternal grandmother; these risks

included health risks, the possibility that Paternal Grandmother may attempt to reunite the children with Father, whether in person, through telephone calls between the children and Father, or having the children write letters to Father, and the difficulty of adjustment for the children, especially given their prior incidents of acting out during or after visitations. *Id.* at 561. Mother testified that she did not believe that any of these possible risks and actions were in the children's best interests. *Id.* This evidence also supported the trial court's findings regarding Mother's concern for contact between the children and Paternal Grandmother, as well as its finding that the visits caused the children act out and behave less normally. *Id.* at 559. The trial court made a finding that it was "left with the impression from [Grandmother's] testimony that she believes that [Mother's] conduct was the genesis of the attack by [Father]." *Id.* at 559, 561. This was supported by testimony from Paternal Grandmother regarding Mother's actions that Paternal Grandmother viewed as the cause of Father's criminal actions towards Mother. *Id.* at 561. Lastly, the trial court found that there was no evidence presented indicating that Mother was an unfit parent, and consequently, gave "special weight to [Mother's] position to oppose Court ordered visitation." *Id.* Given the evidence in the record and the findings of the trial court, the Court held that the evidence described above supported the trial court's findings. *Id.* The findings in turn supported the trial court's judgment that Paternal Grandmother failed to rebut the presumption that Mother was acting in the children's best interests, and that Paternal Grandmother did not meet her burden of proof showing that grandparent visitation was in the children's best interests. *Id.* at 562.

**The Court determined that because the trial court's order was in accordance with IC 31-17-5-2, the issue of whether the trial court erred in concluding that Mother opposed all court ordered visitation between the children and Paternal Grandmother was not a dispositive issue.** *Id.* at 562. IC 31-17-5-2 provides that a trial court may grant grandparent visitation rights if the trial court determines that visitation rights are in the best interests of the child. *Id.* (citing IC 31-17-5-2). "If a parent is fit, a trial court is required to give special weight to the parent's decision regarding grandparent visitation. . . [T]his presumption is rebuttable and the petitioning grandparent has the burden of rebutting this presumption." *Id.* (citing Crafton v. Gibson, 752 N.E.2d 78, 98 (Ind. Ct. App. 2001)). Because the trial court made an explicit finding that Mother was a fit parent, it gave special weight to Mother's decision to deny Paternal Grandmother's visitation with the children. Wilder-Newland, 967 N.E.2d at 562. Grandmother had the burden to rebut the presumption that Mother was a fit parent acting in the children's best interests, and Paternal Grandmother failed to do so. *Id.* The trial court's finding that visitation would not be in the best interests of the children is sufficient to affirm the trial court's order, as it is in accordance with IC 31-17-5-2. *Id.* Thus, the issue as to whether the trial court erred in determining that Mother did not want any court ordered visitation was not a dispositive issue. *Id.*

**The Court reasoned that even if the trial court had erred in determining that Mother opposed all visitation, the order should still be affirmed since the trial court found it was not in the children's best interests to have visitation with Paternal Grandmother.** *Id.* at 563. The Court assumed for purposes of argument that the trial court had erred in determining that Mother opposed all court ordered visitation, and determined that even with this assumption, "the fact remains that the trial court's denial of grandparent visitation is rooted in its well-supported conclusion regarding the best interests of the children. . . Stated differently, even if the trial court erred in concluding that Mother opposed all court-ordered visitation, the evidence supports the

trial court's ultimate conclusion that denial is in the children's best interests, and Indiana Code section 31-17-5-2 only authorizes the trial court to award visitation if it finds doing so is in the children's best interest." Id.

**The Court characterized its disagreement between its opinion and the dissent as being a disagreement over how to determine what Mother's wishes were; the Court determined that, based on the evidence, it was not unreasonable for the trial court to conclude that Mother wanted exclusive control over visitations between the children and Paternal Grandmother, and Mother was not left out of the decision making process by the trial court's ruling.** Id. at 562, 563. The dissent believed that this was the incorrect approach, because it did not take into account the special weight that should be given to a fit parent's decision regarding grandparent visitation. Id. at 562. The dissent argued for remand, so that the trial court could " 'give weight to Mother's decision to allow visitation,'" yet the dissent also proposed that the trial court would not be allowed to review the evidence and find that Mother did oppose all visitation, as Mother has expressed now upon appeal. Id. at 563. The Court felt this was a disagreement over how to determine Mother's wishes regarding visitation and her children. Id. at 562. The Court noted that Mother did not want visitation at all between the middle child and Paternal Grandmother, because the middle child was not Father's biological child. Id. The Court also noted that at least two of Mother's concerns about visitation between the children and Paternal Grandmother would not be relieved at all by just limiting visitation. Id. Because of these pieces of evidence, the Court determined that it was not unreasonable for the trial court to determine that Mother wanted exclusive control over her children and their visitations with Paternal Grandmother. Id. Lastly, the Court noted that the dissent's argument that this decision left Mother out of the decision making process was without weight, since the trial court's order and the Court's opinion did not preclude visitation, it simply gave Mother complete authority in making that decision. Id. at 563.

**In addressing applicable case law, the Court reasoned that the Crafton holding was not applicable to the present case, and even if it were, case law does not totally bind trial courts to determining only how much visitation should occur once a parent expresses some willingness to allow contact between a child and a grandparent; the Court reasoned instead that what Crafton and other applicable case law dictated was that it is the burden of the grandparent to show that visitation is in the best interests of the child, and that the trial court is the final arbiter of the facts and whether it is in the best interests of the children for grandparent visitations to occur.** Id. at 563, 564. In Crafton v. Gibson, 752 N.E.2d 78 (Ind. Ct. App. 2001), the Court had held that "once a parent agrees to some visitation, the dispute is no longer over whether the grandparent will have any access to the child, but instead over how often and much visitation will occur." Wilder-Newland, 967 N.E.2d at 563 (citing Crafton v. Gibson, 752 N.E.2d at 96). The Wilder-Newland Court felt this holding was not relevant, because in order for the Crafton holding to apply, the Court would have to examine evidence that was not most favorable to the judgment, something the Court noted it was prohibited from doing. Wilder-Newland, 967 N.E.2d at 563. Although the dissent argued that the record showed the dispute was over how much access Paternal Grandmother should have to the children, not whether there should be access, the Court disagreed, and held that the argument was over Mother's ability and right to determine whether or not visits should even take place. Id. In doing so, it noted that evidence showed that Mother was frustrated with visits and the children's

reactions to visits, that she did not want Paternal Grandmother to have any visits with the middle child, and that Mother had other concerns regarding the health and safety of the children during visits; because of these items of evidence, the trial court found Mother to be a fit parent, presumed she acted in the best interests of the child, and decided not to require visitation. Id. Furthermore, the Court noted that even if it were to consider evidence that was not in favor of the judgment, the Crafton holding would not warrant reversal or remand in this case, because case law does not bind trial courts to only determining how much visitation should occur the moment a fit parent expresses some willingness to allow contact between a grandparent and a child. Id. at 564. Instead, the Crafton holding means that “Acting under [the presumption that a fit parent’s decision is in the best interest of the child], courts must give special weight to a parent’s decision to deny or limit visitation. Second, a court should give some weight to the fact that a parent has agreed to some visitation. Still, while we must presume, under Troxel, that a fit parent’s decision regarding visitation is in the child’s best interests, that presumption is rebuttable. Thus, a grandparent seeking visitation has the burden of rebutting the presumption that a decision made by a fit parent to deny or limit visitation was made in the child’s best interest.” Id. (citing Spaulding v. Williams, 793 N.E.2d 252, 258 (Ind. Ct. App. 2003). In the present case, Paternal Grandmother failed to meet her burden of showing that what Mother wanted was not in the best interests of the children, and the trial court made an explicit finding to that effect; as a result, the trial court concluded that Mother had the exclusive right to make decision regarding visitation. Wilder-Newland, 967 N.E.2d at 564. The Court refused to substitute its judgment for that of the trial court’s judgment, regardless of whether parts of Mother’s testimony indicated a possible willingness to allow some contact between the children and Paternal Grandmother. Id. The Court noted that this decision did not make any case law meaningless that held a trial court must give special weight to a fit parent’s decision regarding grandparent visitation, because the trial court entered a finding as to what Mother’s decision was, the finding was supported by evidence, and the finding supports the judgment. Id. at 565. The Court also observed that, if Mother intended to allow Paternal Grandmother limited visitation, Mother was free to allow visitation on her own terms without a court order. Id.