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Third Party Visitation

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Indiana case law provides third parties other than grandparents with the chance to seek visitation with a child. This paper primarily uses the term “third party visitation” in order to encompass all types of visitation sought, though it is primarily thought of and call stepparent visitation, and stepparent visitation is what it could most accurately be called.

While grandparent visitation is delineated by statute, and is further fleshed out by case law, third party visitation is entirely a creature of case law. Third party visitation and grandparent visitation share some similarities in the standard for granting or denying visitation, but their standing requirements are quite different. This paper addresses how a third party may assert standing to seek third party visitation, what third parties may obtain standing, the standard for granting or denying third party visitation, modification of third party visitation orders, and jurisdiction between dissolution of marriage courts and paternity courts.

I. Standing For Seeking Third Party Visitation

For a third party to obtain visitation with a child, that third party must carry its burden of proof on two different prongs; the first is standing, and the second is the standard.¹ While standing in grandparent visitation is set forth in detail by statute, standing in third party visitation is set forth in Indiana case law.

In order for a third party to have standing to seek visitation with a child, that third party must have maintained a custodial and parental relationship with a child.² Stepparents have often

¹ *Worrell v. Elkhart Cty. Off. of Family and Children*, 704 NE.2d 2017, 1028 (Ind. 1998).

² *Id.*

maintained a custodial and parental relationship with a child and are able to easily meet this standing element.³

Same sex domestic partners may also meet this standing requirement. In *A.C. v. N.J.*,⁴ the Court reversed the trial court's conclusion that Mother's same sex domestic partner (Partner) lacked standing to seek visitation with Mother's child. Mother and Partner had a child together through artificial reproductive technology, and functioned as a family unit, but eventually ended their relationship. Partner then exercised regular visitation, including overnights, until Mother ended all contact between Partner and the child. The trial court denied Partner's requests for joint custody and visitation.⁵ The Court determined that a prior decision from the Indiana Supreme Court⁶ "signaled its amenability to expanding the class of petitioners with standing to seek third-party visitation to include individuals situated similarly to Partner."⁷ The A.C. Court said that, in the particular factual circumstances of this case, a partner who did not give birth to the child had standing to seek visitation with the child.⁸ However, former domestic partners were not deemed to be automatically entitled to visitation rights, but still must satisfy other the other necessary elements of a third party visitation case.⁹

A more recent case addressing same sex partners is *Gardendour v. Blondelie*.¹⁰ In this case, Gardendour and Blondelie entered into a registered domestic partnership agreement in accordance with California law, which provided that registered domestic partners had the same rights, protections, and benefits, and the same responsibilities, obligations, and duties under law as are guaranteed to spouses, and that the rights and obligations with respect to a child of either of them should be the same as those of spouses. The couple moved to Indiana and agreed to co-parent a child. Gardendour was artificially inseminated and gave birth to the child. After their relationship ended, Blondelie returned to California and Gardendour filed a petition for dissolution of marriage. The Court affirmed the trial court's orders and held that Gardendour and Blondelie, as spouses, knowingly and voluntarily consented to artificial insemination with Gardendour as the birth parent, and that Blondelie is the child's legal parent.¹¹ Blondelie was therefore entitled to parenting time with the child.¹²

³ See *Richardson v. Richardson*, 34 N.E.3d 696, 701 (Ind. Ct. App. 2015) ("a stepparent may be granted visitation upon establishing the existence of a custodial and parental relationship"); *Nunn v. Nunn*, 791 N.E.2d 779 (Ind. Ct. App. 2003) (there was ample evidence to support trial court's finding that Stepfather had a custodial and parental relationship with the child); *Francis v. Francis*, 654 N.E.2d 4 (Ind. Ct. App. 1995); *Caban v. Healy*, 634 N.E.2d 540 (Ind. Ct. App. 1994); *In Re Custody of Banning*, 541 N.E.2d 283 (Ind. Ct. App. 1989); *Collins v. Gilbreath*, 403 N.E.2d 921, 923-24 (Ind. Ct. App. 1980).

⁴ 1 N.E.3d 685, 697 (Ind. Ct. App. 2013).

⁵ *Id.*

⁶ *King v. S.B.*, 837 N.E.2d 965 (Ind. 2005)

⁷ *A.C. v. N.J.* at 697, citing *King v. S.B.*, 837 N.E.2d 965 (Ind. 2005).

⁸ *A.C.* at 697.

⁹ *Id.*; but see *M.S. v. C.S.*, 938 N.E.2d 278 (Ind. Ct. App. 2010) (Court affirmed the trial court's order which vacated the trial court's previous order approving an agreement signed by Mother and her former same sex Domestic Partner).

¹⁰ 60 N.E.3d 1109 (Ind. Ct. App. 2016), *trans. denied*.

¹¹ *Gardendour*, 60 N.E.3d at 1120.

¹² *Id.* at 1120-21.

Foster parents, despite seemingly maintaining a custodial and parental relationship with a child, cannot obtain standing to seek third party visitation with a child. In *Worrell v. Elkhart Cty. Office of Family*,¹³ the Court held that a foster parent's relationship with a child does not constitute a custodial and parental relationship sufficient to give rise to visitation rights. The Court noted that while a foster parent does act in a custodial capacity, the foster relationship cannot be grounds for standing in a third party visitation petition.¹⁴ In coming to this conclusion, the Court opined that foster relationships were meant to be temporary placements until a child could go home or be adopted.¹⁵ The Court determined that the relationship between foster parent and foster child was contractual, as the foster parents were reimbursed by the Department of Child Services for their services.¹⁶ The Court further noted that a foster parent may only be one in a series of other foster parents, and it could leave a child and the child's permanent family open to a multitude of people seeking visitation with that child.¹⁷

While older Indiana case law is more vague as to which categories of third parties may have standing as persons who maintained a custodial and parental relationship with a child, newer case law has narrowed this range of persons. In *Tinsley v. Plummer*, Great Aunt and Uncle sought visitation with a child.¹⁸ The Court noted that prior case law allowed for stepparent visitation, and Great Aunt and Uncle argued that this prior case law did not apply to just stepparents.¹⁹ Instead of addressing the argument that more than just stepparents could obtain standing through the maintenance of a custodial and parental relationship with a child, the Court instead held that Great Aunt and Uncle had simply not maintained a custodial and parental relationship with the child, no matter their legally-defined relationship to the child.²⁰ The temporary order which gave them custody for a short period of time was insufficient to "bootstrap" them into having such standing.²¹

Although this reasoning may have given the impression of a door left open to others besides stepparents who wished to seek third party visitation with a child, the *Worrell* Court was concerned about potentially opening the door even further and granting visitation privileges to a wide range of unrelated third parties who "happen to feel affection for a child."²² The *Worrell* Court summarized prior case law as providing visitation to stepparents, but denying visitation to those who are not stepparents, such as ex-boyfriends and great aunts and great uncles.²³ The

¹³ 704 N.E.2d 1027, 1029 (Ind. 1998)

¹⁴ *Worrell*, 704 N.E.2d at 1028.

¹⁵ *Id.* at 1029.

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ 519 N.E.2d 752 (Ind. Ct. App. 1988)

¹⁹ *Tinsley*, 519 N.E.2d at 754.

²⁰ *Id.*

²¹ *Id.*

²² *Worrell*, 704 N.E.2d at 1029.

²³ *Id.*

Worrell Court opined that prior case law clearly indicated third party visitation privileges were limited to stepparents.²⁴

Further case law adhered to the reasoning and determination in *Worrell* that third party visitation was only available to stepparents. In *Kitchen v. Kitchen*, the Court found that the trial court lacked authority to grant visitation for maternal Aunt and Uncle with the child, because Aunt and Uncle lacked standing to petition for visitation.²⁵ The child and Mother had lived with Aunt and Uncle until Mother's death after an extended illness. At the time the trial court entered the visitation order, the child was living with Father. The Court determined that Indiana statutes and case law conferred standing for third party visitation only to grandparents and stepparents.²⁶ In *K.S. v. B.W.*, the Court reversed the grant of visitation to Boyfriend, stating that Indiana law does not provide for an order of visitation under this circumstance.²⁷ Boyfriend lived with Mother and the child for several years, the child called Boyfriend "Daddy", Boyfriend was listed on the child's school papers as "Dad", and Mother allowed visits between the child and Boyfriend after their relationship ended.²⁸ In *In Re I.E.*, the trial court terminated a guardianship and modified custody to Father, but awarded Guideline visitation with the child to the child's former Guardians.²⁹ The Court reversed the visitation order, finding that it was void.³⁰ The Court cited prior case law and reaffirmed that only parents, stepparents, and grandparents have standing to be granted visitation rights, in support of its decision.³¹

Recent case law determined that the reasoning in *A.C. v. N.J.*³² could not be extended to Mother's Ex-Boyfriend. The *Brown v. Lunsford* Court concluded that the reasoning in the *A.C.* opinion was inapplicable to the *Brown* case and therefore not controlling.³³ The Court noted that its opinion in *A.C.* was an effort to resolve the legal issue of same-sex partner's rights before the U.S. Supreme Court decided in *Obergefell v. Hodges* that same-sex partners may marry.³⁴ The Court opined the *A.C.* holding or rationale could be extended to the *Brown* case in light of the unique factual circumstances and particular legal landscape in which *A.C.* was decided.³⁵

Other cases where a person has been deemed to not have standing to seek third party visitation with a child include: *Matter of E.M.*, where Mother's former boyfriend lacked standing to pursue visitation with Mother's child;³⁶ and *In Re Paternity of J.A.C.* where the Court held that the trial court's findings were insufficient to grant visitation to maternal aunt because the trial

²⁴ *Id.*

²⁵ 953 N.E.2d 646, 650 (Ind. Ct. App. 2011).

²⁶ *Id.*

²⁷ 954 N.E.2d 1050, 1052 (Ind. Ct. App. 2011).

²⁸ *Id.*

²⁹ 997 N.E.2d 358, 366 (Ind. Ct. App. 2013).

³⁰ *Id.*

³¹ *Id.*

³² 1 N.E.3d 685 (Ind. Ct. App. 2013).

³³ 63 N.E.3d 1057, 1065 (Ind. Ct. App. 2016).

³⁴ *Brown*, 63 N.E.3d at 1065, citing *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015).

³⁵ *Brown* at 1065.

³⁶ 654 N.E.2d 890 (Ind. Ct. App. 1995).

court did not find that relationship between aunt and child was custodial and parental and that visitation was in child's best interest.³⁷

Case law indicating that only stepparents count as third parties who may seek visitation is easily harmonized with the line of Indiana cases which allow for former same sex partners seeking visitation with a child. The Indiana Supreme Court's decision in *King v. S.B.* "signaled its amenability to expanding the class of petitioners with standing to seek third-party visitation to include individuals similar to Partner."³⁸ The allowance of same sex partners to essentially qualify as stepparents was an acknowledgement of the reality of situation at the time; namely, that same sex partners could not marry and obtain stepparent status, which then excluded same sex couples from the benefit of being able to seek third party visitation as a stepparent. *King v. S.B.*, and its progeny, *A.C. v. N.J.* and *Gardenour v. Blondelie* provide a narrow exception to the stepparent rule. Stepparents and former same sex partners are the only third parties who may seek to qualify as having standing to seek third party visitation with a child. The *Brown v. Lunsford* Court noted that its opinion in *A.C.* was an effort to resolve the legal issue of same-sex partner's rights before the U.S. Supreme Court decided in *Obergefell v. Hodges* that same-sex partners may marry.³⁹

II. Standard for Granting or Denying Third Party Visitation

a. Application of Parental Presumption

The standard for granting or denying third party visitation with a child is currently in flux in Indiana, with one Court of Appeals opinion holding that a third party must overcome the parental presumption and a trial court must give special weight to a fit parent's decision on visitation,⁴⁰ and another Court of Appeals opinion holding that the language which *Brown* relies upon is dicta, and that no parental presumption should be applied to third party visitation cases until the Indiana Supreme Court addresses the matter.⁴¹

Until this split between the Court of Appeals decisions is resolved, it is safest for practitioners to proceed with third party visitation cases by first establishing standing to seek visitation with the child, and then having the third party overcome the parental presumption and the special weight given to a fit parent's decision on visitation.⁴² The third party must also show that visitation is in the child's best interests.⁴³

Initially, case law provided that the only required element for a third party to show and the trial court to find was that the visitation with the third party was in the child's best interests.⁴⁴

³⁷ 734 N.E.2d 1057, 1060 (Ind. Ct. App. 2000).

³⁸ *A.C.*, 1 N.E.3d at 697, citing *King v. S.B.*, 837 N.E.2d 965 (Ind. 2005).

³⁹ *Brown*, 63 N.E.3d at 1065.

⁴⁰ *Id.*

⁴¹ *Richardson v. Richardson*, 34 N.E.3d 696, 702 n.4 (Ind. Ct. App. 2015).

⁴² *Schaffer v. Schaffer*, 884 N.E.2d 423 (Ind. Ct. App. 2008); *Brown v. Lunsford*, 63 N.E.3d 1057 (Ind. Ct. App. 2016).

⁴³ *Richardson v. Richardson*, 34 N.E.3d 696, 702-3 (Ind. Ct. App. 2015).

⁴⁴ *Worrell*, 704 N.E.2d at 1028 (Ind. 1998).

However, case law is continually evolving and the end result may include the standards and requirements which are also placed on grandparent visitation.

This evolutionary process of the standard in third party visitation cases began with *Schaffer v. Schaffer*, where Stepfather petitioned to have visitation with Mother's daughter.⁴⁵ Although the Court ultimately denied Mother's request to end visitation on other grounds, the Court agreed with Mother that "the same parental presumption and special weight accorded to parents in an initial grandparent visitation proceeding should be extended to parents in an initial third party stepparent visitation proceeding."⁴⁶ Since the case was decided on other grounds, and the issue of granting stepparent visitation without overcoming a parental presumption was never before the Court, it would be possible to assume that this was dicta. Indeed, *Richardson v. Richardson* did call this language dicta for this exact reason.⁴⁷ *Richardson* noted that Wife argued she was entitled to the strong parental resumption afforded to parents in grandparent visitation cases; however, the *Richardson* Court called the *Schaffer* language "dicta" because the *Schaffer* Court was not asked to review an initial stepparent visitation order, and "until our supreme court declares otherwise, we decline to extent the parental presumptions applicable to a statutory grandparent visitation proceeding to a stepparent visitation order issued pursuant to a dissolution decree."⁴⁸

However, case law after *Richardson* quotes *Schaffer* as extending the grandparent visitation case law standards of a parental presumption and special weight given to a fit parent's decision regarding visitation. In *Brown v. Lunsford*, the Court reversed the trial court's award of third party visitation to Mother's former Boyfriend, holding in part that the trial court did not take into consideration the decision that Mother, a fit parent, made in denying Boyfriend's visitation requests, and that Boyfriend's evidence did not overcome the strong parental presumption.⁴⁹ In coming to this conclusion, the *Brown* Court examined the *Schaffer* case and noted, "In *Schaffer*, this court extended 'the parental presumption and special weight accorded to parents in an initial grandparent visitation proceeding' to parents in 'an initial third-party stepparent visitation proceeding.'... We, too, extend the parental presumption and special weight afforded parental to the case before us. It is only logical that, if such a presumption and special weight favoring a parent's choices for his or her child are appropriate in cases involving close familial and legal relationships between children and grandparents or stepparents, the same considerations should exist in cases such as the one before us."⁵⁰

The *Brown* Court clearly did not consider the language in *Schaffer* to be dicta, and instead, determined *Schaffer* to hold that the standards and burdens of proof laid forth in grandparent visitation law applied to initial stepparent visitation proceedings. In turn, *Brown* extended this *Schaffer* holding to all third-party visitation cases.

Reconciling *Schaffer*, *Richardson*, and *Brown* is not feasible, given that one Court of Appeals decision clearly applies the parental presumption to third party visitation cases, and the other

⁴⁵ *Schaffer v. Schaffer*, 884 N.E.2d 423 (Ind. Ct. App. 2008).

⁴⁶ *Schaffer*, 884 N.E.2d at 427.

⁴⁷ *Richardson v. Richardson*, 34 N.E.3d at 702 n.4.

⁴⁸ *Id.*

⁴⁹ *Brown v. Lunsford*, 63 N.E.3d 1057, 1065 (Ind. Ct. App. 2016).

⁵⁰ *Id.*

Court of Appeals decision dismisses it as dicta. Given this split, it is best for practitioners to proceed as though the standard for all third party visitation is the same standard as grandparent visitation cases: a third party must overcome the strong parental presumption, and the court must give special weight to a fit parent's decision on visitation. Once the parental presumption has been overcome, then the third party must additionally show that visitation is in the child's best interests. By using this approach, third parties will have ensured that they have overcome all necessary and potential hurdles in their case to seek third party visitation with a child, rendering the trial court's decision more difficult to successfully appeal. This approach also provides protections to natural parents which are consistent with grandparent visitation law, guardianship and third party custody law, and adoption law.

b. Child's Best Interests

It is important to not forget the best interests of the child element of the standard for granting third party visitation with a child. Visitation being in the child's best interest is a required element of granting third party visitation, and one that all Indiana case law indicates is necessary. In the event that case law eventually evolves to require the third party to overcome a parental presumption, it is still not enough to overcome the parental presumption; the third party must still carry their burden of proof on visitation being in the child's best interests.

For cases addressing the child's best interests, *see Richardson v. Richardson*, holding that visitation with Husband was in the child's best interests: (1) Husband had provided financial, emotional, physical, and educational support to the child for almost eight years; (2) Husband came into the child's life when she was two years old, and was essentially the only father she had ever known; (3) the child referred to Husband as "dad" or "daddy"; (4) Husband had been awarded sole legal and physical custody of the child's half-brother, and the visitation order provided for the child to spend time with her half-brother on the weekends that he was with Husband; and (5) the child and her half-brother had grown up together, and it was in their best interest to spend time together;⁵¹ *M.S. v. C.S.*, where the Court found that the following facts amply supported the trial court's finding that continued visitation with Partner was not in the child's best interests: (1) Partner threw things at Mother and pushed her to the ground in the child's presence; (2) Partner threatened Mother's life in the child's presence; and (3) Partner's actions were so threatening that the six-year-old child tried to intervene by holding on to Partner and telling Mother to leave;⁵² *Schaffer v. Schaffer*, holding that Mother presented no evidence to

⁵¹ 34 N.E.3d 696, 702-3 (Ind. Ct. App. 2015).

⁵² 938 N.E.2d 278, 287 (Ind. Ct. App. 2010).

show that ending visitation was in the child's best interests;⁵³ *Francis v. Francis*, holding that Husband had cared for children all their lives, and children knew him as their father.⁵⁴

III. *Modifying Third Party Visitation*

Once third party visitation has been granted and established, the standards and burdens shift. When the issue is modifying visitation, whether that is increasing, decreasing, or terminating it, the party requesting the modification bears the burden of proof, and the only inquiry is the best interests of the child.

In *Schaffer v. Schaffer*, Mother and Husband divorced.⁵⁵ Husband was given visitation with child, but the child was later determined to not be his child. No appeal ever originated from Husband's visitation order, but Mother eventually filed a petition to end Husband's visitation because he was not child's father. The trial court denied Mother's request, and Mother appealed. Mother argued that grandparent visitation case law should apply to third party visitation cases, and consequently, that before Husband could have been given visitation, he should have had to overcome the strong parental presumption and the trial court should have given special weight to Mother's decisions as a fit parent.⁵⁶ The Court agreed with this assessment, but noted that Mother was appealing her denied petition to end Husband's visitation, not the order granting Husband visitation in the first place.⁵⁷ The Court held that the parental presumption does apply in initial third party visitation cases, but does not apply in proceedings to modify third party visitation which has already been granted and established.⁵⁸ Since the only issue on appeal here was a modification of third party visitation, the sole guiding standard was the child's best interests, and Mother, as the person requesting modification, had the burden of proof.⁵⁹ Since Mother offered no evidence showing how her desire to end visitation was in the child's best interests, the trial court's order was affirmed.⁶⁰

IV. *Jurisdiction*

The court which originally addresses the child custody determination is the court which retains jurisdiction over all child custody matters, including third party visitation. IC 31-21-5-2 grants exclusive, continuing jurisdiction over child custody issues to the court that issued the original child custody determination.

In *Grimes v. Houser*, the Court held that the trial court did not err when its dismissed Stepmother's petition for visitation on the grounds that the dissolution court had continuing and

⁵³ 884 N.E.2d 423 (Ind. Ct. App. 2008).

⁵⁴ 654 N.E.2d 4 (Ind. Ct. App. 1995).

⁵⁵ 884 N.E.2d 423, 428 (Ind. Ct. App. 2008).

⁵⁶ *Schaffer*, 884 N.E.2d at 424.

⁵⁷ *Id.* at 427.

⁵⁸ *Id.*

⁵⁹ *Id.* at 428.

⁶⁰ *Id.* at 429; *see also In Re Adoption of A.A.*, 51 N.E.3d 380, 390 (Ind. Ct. App. 2016) (Court held, as a matter of first impression, that the burden for modification of grandparent visitation rests on the party seeking modification).

original jurisdiction.⁶¹ Since IC 31-21-5-2 grants exclusive, continuing jurisdiction over child custody issues to the court that issued the original child custody determination, the dissolution court had continuing and original jurisdiction over matters concerning the child.⁶² Consequently, the trial court did not err in dismissing Stepmother's petition.⁶³ Stepmother's argument that she was not a party to the dissolution case, and consequently, the trial court should have heard her petition, was irrelevant to the jurisdiction matter.⁶⁴ The *Grimes* Court opined that, in light of the statute and prior case law, Stepmother's argument that since she was not a party to the dissolution case, she could properly file a separate petition in another court had no relevancy to IC 31-21-5-2 and the jurisdiction matter at hand.⁶⁵ The Court also held that the trial court properly awarded attorney's fees.⁶⁶

If a paternity order addressing custody and parenting time exists for a child, and subsequently, the biological parent and the stepparent divorce and the stepparent seeks custody, the dissolution court does have the authority to issue a stepparent visitation order.

In *Richardson*, the Court affirmed the dissolution court's order granting Husband visitation with stepdaughter, who was Wife's child from a former relationship.⁶⁷ On appeal, Wife asserted that the dissolution court's order conflicted with the paternity order for the child, which allowed the child's adjudicated father to have parenting time with the child. The Court noted that the dissolution court's order adjudicated visitation of the child between Wife and Husband, and that Husband's exercise of visitation might be only to the detriment of Wife's custodial time with the child.⁶⁸ The Court said that the orders in the dissolution and paternity matters were wholly separate, there was no conflict between the orders, and the dissolution court had authority to grant stepparent visitation rights to Husband.⁶⁹

⁶¹ 108 N.E.3d 397 (Ind. Ct. App. 2018).

⁶² *Grimes*, 108 N.E.3d at 398.

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ *Id.* at 398, citing *State ex rel. Meade v. Marshall Super. Ct. II*, 644 N.E.2d 87 (Ind. 1994) (Indiana Supreme Court noted that attempts to avoid the proper procedures through collateral attack are prohibited and ordered the trial court to dismiss the stepmother's petition due to lack of jurisdiction).

⁶⁶ *Grimes* at 399.

⁶⁷ *Richardson v. Richardson*, 34 N.E.3d 696, 704 (Ind. Ct. App. 2015).

⁶⁸ *Richardson*, 34 N.E.3d at 701-02.

⁶⁹ *Id.* at 702; see also *Nunn v. Nunn*, 791 N.E.2d 779 (Ind. Ct. App. 2003).