

Children's Law Center of Indiana



Guardianship Termination and Visitation Issues

Guardianship Termination

The conditions for termination of guardianships are set forth in I.C. 29-3-12-1. The statute requires the court to terminate the guardianship (1) on the minor's eighteenth birthday; or (2) in the event of the minor's death. It allows the court to terminate the minor's guardianship (1) if the guardianship property does not exceed \$3,500.00; (2) the minor's residence has been changed to another state and a guardian has been appointed in the new state; (3) the minor marries; (4) the minor is adopted; (5) or the guardianship is no longer necessary for any reason. I.C. 29-3-6-3 provides a procedure that any person may follow at any time after the appointment of a guardian, to receive written notice of, among other things, the removal, suspension, or discharge of the guardian, or the final termination of the guardianship.

The termination of the guardianship is initiated by the person who desires to terminate the guardianship, frequently a parent or another relative of the child, filing a verified petition with the court. The guardian and other persons whom the court directs should receive a copy of the petition and the order setting the petition for hearing in accordance with I.C. 29-1-1-12 through I.C. 29-1-1-14. The guardian has the burden of proof on a parent's petition to terminate guardianship. The guardian must prove that the

continuation of the guardianship is necessary. See Matter of Guardianship of R.B., 619 N.E.2d 952, 954 (Ind. Ct. App. 1993).

Current case law holds that, in deciding whether to terminate a guardianship, the clear and convincing evidence standard must be used, and detailed and specific findings, rather than a generalized finding, are required. In In Re Guardianship of A.R.S., 816 N.E.2d 1160 (Ind.Ct. App. 2004), the Court reversed and remanded the trial court's denial of the mother's petition to terminate the guardianship of her two children by the maternal grandfather and step-grandmother. In so doing, the Court held that a generalized finding that a placement other than with the natural parent is in a child's best interests will not be adequate to support such determination, and detailed and specific findings are required. Id. at 1162-63. Further, the Court reversed because, absent any findings and in light of confusion at the trial regarding what standard of review to apply to the action, the Court could not be certain that the proper standard of review, the clear and convincing evidence standard, was employed. Id. at 1163. Judge Crone dissented, stating that he does not agree the Court should expand the special findings requirement to subsequent guardianship proceedings once the threshold for establishing a guardianship has been met; and he believes such petitions should be treated the same as other petitions to modify custody. Id.

The Court majority stated two purposes for special findings of fact: (1) to provide the parties and the reviewing court with the theory upon which the case was decided; and (2) as a means of alerting parents of the reasons why their children are not being returned to their custody, thereby effectively putting the parents on notice as to what steps they must take before their children will be returned to them. The Court acknowledged that

the statute does not require specific factual findings, but relying on In Re the Guardianship of B.H., 770 N.E.2d 283, 287 (Ind. 2002), noted “our supreme court has explicitly mandated trial courts to issue detailed and specific findings when a child is placed in the care and custody of a person other than a natural parent.” The Court detailed two reasons to extend the detailed and specific findings requirement to petitions to terminate guardianship: (1) The issues are the same regardless of whether the placement is the initial placement or a question of whether the placement should be continued; and (2) the reason behind requiring detailed and specific findings applies in equal force to termination of guardianship petitions, i.e. notifying the parties and the reviewing court of the facts and theory upon which the decision is based.

In A.R.S., the Court of Appeals cited as appropriate to petitions to terminate guardianship, the standard in Guardianship of B.H. at 287:

In a proceeding to determine whether to place a child with a person other than the natural parent, evidence establishing the natural parent’s unfitness or acquiescence or demonstrating that a strong emotional bond has formed between the child and the third person is important, but the trial court is not limited to these criteria. The issue is not merely the “fault” of the natural parent. Rather it is whether the important and strong presumption that a child’s interests are best served by placement with the natural parent is clearly and convincingly overcome by evidence proving that the child’s best interests are substantially and significantly served by placement with another person....A generalized finding that a placement other than with the natural parent is in a child’s best interests, however, will not be adequate to support such determination, and detailed and specific findings are required.

A.R.S. at 1162.

In B.H., the Supreme Court resolved the then existing dispute in the case law regarding the nature and quantum of evidence required to overcome the strong

presumption that the child's best interests are ordinarily served by placement in the custody of the natural parent. To resolve this dispute, the Court held:

that, before placing a child in the custody of a person other than the natural parent, a trial court must be satisfied by clear and convincing evidence that the best interests of the child require such a placement. The trial court must be convinced that placement with a person other than the natural parent represents a substantial and significant advantage to the child. The presumption will not be overcome merely because "a third party could provide the better things in life for the child."

B.H. at 287. B.H. involved the father of two children appealing the trial court's appointment of the children's step-father as the children's guardian following the death of the children's mother. The Court of Appeals in In re Guardianship of B.H., 730 N.E.2d 743 (Ind.App. Jun 15, 2000), had reversed and remanded, holding that the trial court's findings that father was unfit, that he had abandoned his children, and that it was in the children's best interests to remain in the custody of their stepfather were not supported by sufficient evidence to rebut the presumption of the father's right to custody. The Indiana Supreme Court, however, granted transfer, vacated 730 N.E.2d 743, and affirmed the trial court's guardianship appointment. The Supreme Court found the many factors given in the trial court's findings of fact and conclusions of law sufficient to grant the stepfather's guardianship petition. The listed factors were: (1) the estranged relationship between the children and their father and his lack of any significant interaction with them since his 1991 separation from their mother; (2) the failure of the father to stay current in paying his child support for the children; (3) instances of abuse before the separation and the father's violent confrontation with the children's maternal aunt after the separation; (4) the father's history of excessive drinking that resulted in an arrest for driving while intoxicated in 1998 and a citation for public intoxication after he moved to Houston,

Texas in 1996; (5) the stepfather's role as the only psychological father the children have known since December 1991; (6) the children's connections with the community and the proximity of extended family provided by placement with the stepfather; (7) the teenaged children's strong desire to remain in Indiana with the stepfather; (8) the recommendations of the CASA report and the children's psychotherapist that it is in the best interests of the children to remain in Indiana with the stepfather; and (9) the stepfather's role as the primary source of financial support for the children for the previous four years.

Id. at 288.

The Court of Appeals quoted and applied the B.H. test in In Re Paternity of V.M., 790 N.E.2d 1005 (Ind. Ct. App. 2003). In V.M., the parents had voluntarily relinquished custody of the children to the maternal grandfather, who was appointed the permanent custodian of the children. At first the father had only sporadic contact with his two children. Later the father quit drinking and using drugs, began attending church regularly, visited the children consistently on weekends and paid child support to the custodian. The father filed a petition for modification of custody of his two children, but the court denied his modification request after a hearing.

The trial court concluded that the relationship and affections between the custodial grandfather and the children had become so interwoven that to sever them by modifying custody would seriously mar and endanger the future happiness of the children. The Court's review of the record supported the trial court's conclusion that the custodial grandfather had rebutted the parental presumption by evidence of the father's past unfitness, voluntary abandonment of the children, long acquiescence in the grandfather's custody and other factors. Id. at 1009.

In Roydes v. Cappy, 762 N.E.2d 1268 (Ind. Ct. App. 2002), the Court affirmed the trial court's denial of the parents' petition for termination of guardianship. The Court opined that, although the guardianship was originally granted to obtain health insurance for the child, the Court could look beyond the original grounds for granting the guardianship in making its decision to terminate the guardianship. Id. at 1274. The Court concluded that the trial court had not abused its discretion in denying the parents' petition to terminate, even though the trial court did not specifically find that the mother was unfit. Id. at 1275. The trial court had found the following: (1) the grandmother's concerns about the mother's inability to care for the child were valid; (2) the mother had a history of losing jobs and not paying bills; (3) the mother had been physically violent toward the grandmother; and (4) the mother had been physically violent towards the father in the child's presence. The Court further opined that a parent's very recent history of financial irresponsibility and employment instability, especially if it is consistent with an established pattern of such behavior, could be considered in determining whether a parent is presently fit to regain custody of a child. Id. The Court noted that the mother had been unable to maintain her former residence and automobile even with the guardian's assistance, and that the mother's income was insufficient to meet the financial needs of herself and the child. Id. at 1276.

In Harris v. Smith, 752 N.E.2d 1283 (Ind. Ct. App. 2001), the Court affirmed the trial court's order modifying custody from the paternal grandparents to the mother. On appeal the grandparents claimed that the mother's agreement to place the child in the custody of the grandparents was tantamount to an admission of unfitness. The Court disagreed with this argument, but acknowledged that the trial court was required to

consider the stability of the child in making its decision. Id. at 1288. The Court also opined that there is a constitutionally based preference that a parent, rather than a non-parent has custody when the parent has not been shown to be unfit. Id. at 1288-1289, citing Troxel v. Granville, 530 U.S. 57, 120 S. Ct. 2054, 147 L. Ed. 2d 49 (2000); Crafton v. Gibson, 752 N.E.2d 78 (Ind. Ct. App. 2001); Matter of Guardianship of L.L., 745 N.E.2d 222 (Ind. Ct. App. 2001). The Court also stated that a non-parent seeking custody is required to prove the parent's unfitness at the present time, not at some time in the past. Harris at 1290. The Court opined that the grandparents had not successfully rebutted the mother's presumptively superior right to custody with a clear and persuasive showing that the mother was presently unfit. Id. The evidence supporting the trial court's decision included the following: (1) the mother's employment as assistant manager at a café where she could earn up to \$600.00 per week; (2) the mother's employer's testimony that the mother was a good employee; (3) the mother had a two bedroom trailer home with her boyfriend and her son; (4) the maternal grandmother was available to baby-sit with the grandchild and to transport the mother to work because the mother's license was suspended; (5) the mother's testimony that she had stopped using drugs, but still drank beer; (6) the mother's testimony that the child in this case had stated that she wanted to stay with her mother and brother. Id.

In Matter of Guardianship of R.B., 619 N.E.2d 952 (Ind. Ct. App. 1993), the trial court granted the mother's petition to terminate the maternal grandmother's guardianship, and the grandmother appealed. The Court affirmed the guardianship termination, finding ample support for the trial court's decision including the testimony of two psychologists that it was in the child's best interests to be reunited with the mother, and sufficient

evidence to rebut the following three factors: (1) unfitness of the natural parent; (2) long acquiescence to the third-party's custody of the child, and (3) voluntary relinquishment such that the child and third party have become so interwoven that to sever the living arrangement would seriously mar and endanger the future happiness of the child. Among the trial court's findings were the following: (1) the mother's frequent visits with the child; (2) the mother's stable employment and housing situation; (3) the stepfather's good relationship with the child; (4) the psychologists' opinions that the best interests of the child would be served by reunification with the mother; and (5) one psychologist's finding that the mother was well adjusted mentally and emotionally.

In Styck v. Karnes, 462 N.E. 2d 1327 (Ind. Ct. App. 1984), the Court affirmed the denial of the mother's petition to terminate the paternal grandfather's guardianship. The mother had killed the child's father at the time the guardian was appointed. The mother had completed her probation and counseling when she sought to terminate the guardianship. There was no evidence that the mother was currently unfit, but the Court found that the following evidence supported continuation of the guardianship: (1) the mother had not pursued her termination petition for two and one-half years after filing it; (2) the mother had failed to communicate with the child for over three years; and (3) there was a strong bond between the child and his grandfather as seen by the psychiatric social worker. The Court opined that the presumption in favor of the mother's custody may have been overcome because the evidence permitted a reasonable inference of voluntary relinquishment by the mother such that the child's affections had become inextricably interwoven with the paternal grandfather's affections.

Visitation Issues

No guardianship statutes govern the type or amount of parental visitation which the guardian must provide. I.C. 29-3-8-1(a) grants a guardian “all of the responsibilities and authority of a parent.”

Arguably the natural parents are entitled to visitation in a guardianship or third-party custodianship. Indiana case law has characterized visitation as a “sacred, precious privilege.” See Matter of Adoption of Topel, 571 N.E.2d 1295, 1299 (Ind. Ct. App. 1991) and Stewart v. Stewart, 521 N.E.2d 956, 960 (Ind. Ct. App. 1988). Paternity and dissolution law provide that the noncustodial parent is entitled to reasonable visitation rights unless the court finds, after a hearing, that visitation by the noncustodial parent might endanger the child’s physical health or significantly impair the child’s emotional development. See I.C. 31-14-14-1; I.C. 31-17-4-1. The Indiana Supreme Court adopted the Indiana Parenting Time Guidelines with an effective date of March 31, 2001. The Scope of Application of the Guidelines states that the Guidelines are applicable to all custody situations, including paternity cases and cases involving joint legal custody where one person has primary physical custody. Guardianships are not listed as being within the Scope of the Guidelines; however, it is not clear whether guardianship proceedings qualify as “child custody situations.” If guardianship proceedings qualify as “child custody situations,” the Scope of the Indiana Parenting Time Guidelines states that the Guidelines may not be applicable “to situations involving family violence, substance abuse, risk of flight with a child, or any other circumstances the court reasonably believes endanger the child’s physical health or safety, or significantly impairs the child’s emotional development.” The Scope section further states that there is a “presumption

that the Indiana Parenting Time Guidelines are applicable in all cases covered by these guidelines” and “deviation from these guidelines by either the parties or the court must be accompanied by a written explanation indicating why the deviation is necessary or appropriate in the case.”

The court which appoints the guardian may order specific visitation to be provided to the parents by the guardian. Because of the reasons for the necessity of the guardianship, the court needs to balance the parents’ right to visitation against the minor’s right to safety and stability. The type and amount of visitation which the proposed guardian should provide would best be ordered by the court based on the circumstances of the particular case. Sometimes the inclusion in a court order of a detailed plan regarding visitation, which considers the reason(s) guardianship was necessitated, would be in the best interest of the children. When guardianship is the designated CHINS permanency plan the type and amount of visitation should be carefully considered by the department of child services and fully discussed with the guardian. Optimally, the guardianship appointment order should include specific guidelines for parental visitation which are tailored to the child’s need for protection and the parents’ situation.

The second Comment to the Preamble for Indiana Parenting Time Guidelines states: “[These guidelines] are not meant to foreclose the parents from agreeing to, or the court from granting, such additional or reduced parenting time as may be reasonable in any given case.” Additionally, Indiana case law illustrates that the trial court enjoys a great degree of discretion with regard to visitation issues.

In Higginbotham v. Higginbotham, 822 N.E.2d 609 (Ind. Ct. App. 2004), the Court affirmed the trial court's termination of the father's midweek visitation with his daughter and conditioned its resumption upon the child's showing vast improvement in her scholastics. The Court's standard of review was abuse of discretion, and the Court noted that no abuse of discretion occurs if there is a rational basis in the record supporting the trial court's determination. The Court noted evidence that (1) the child was an extremely vulnerable child in a high-risk situation; (2) the midweek visitations were contributing to the child's difficulties at school because the child would return to the mother's house with incomplete or substandard homework; (3) the child was emotionally distressed and upset because she was not getting the cooperation and assistance she needed while in the father's home; (4) the father did not give the child the medication prescribed for her anxiety while she was in his care, instead asking her if she needed it; and (5) the father threatened to withhold some of the child's prescribed medication. The Court also concluded that, considering that the child's academic problems were part of the basis for the suspension of the father's midweek visits, the trial court acted reasonably in permitting the visits to resume when the child shows scholastic improvement.

Id. at 612-13.

The Court in Appolon v. Faight, 796 N.E.2d 297 (Ind. Ct. App. 2003) affirmed the trial court's denial of visitation, even supervised visitation, for the father with his children. The Court noted that the trial court determined that "visitation, at this present time, would be harmful to the children of the parties." The Court noted that the evidence showed that the father (1) physically abused the mother by hitting her with his fists and a belt; (2) raped the mother; (3) threatened to take the children and run; and, (4) most

importantly, in a letter to the mother, said he had molested the children. Id. at 299. The Court noted that, by this holding, it was not countenancing the unwarranted denial of appropriate access to the children of a non-custodial parent, and that if, in the future the father should demonstrate to the trial court that “he no longer poses a threat to his children’s physical health or emotional development, the decision regarding visitation rights should be re-evaluated.” Id. at 300.

In Farrell v. Littell, 790 N.E.2d 612 (Ind. Ct. App. 2003), the Court reversed the juvenile court’s suspension of the father’s visitation with his five-year-old who is hearing impaired and has speech and other medical difficulties. The mother had alleged that the father, who was never married to the mother but had established paternity, was the cause of the child’s sexualized behavior which the child exhibited and which was observed by several home health care providers of the child. In its findings, the juvenile court stated “the court is left with uncertainty as to what the child has been exposed to or whether there has been any inappropriate sexual conduct with the child.” Nevertheless, the juvenile court suspended the father’s visitation pending a full evaluation of the father by the Indianapolis Institute for Families, “which shall include a referral for a voice stress examination.” Id. at 615. On appeal, the Court held that the juvenile court did not, and, based on the record, could not make a specific finding that visitation with the father would endanger the child’s physical health or well-being or significantly impair the child’s emotional development; and that absent such a specific finding, the juvenile court did not have the authority to restrict the father’s visitation with the child. Id. at 617-18.

Clark v. Madden, 725 N.E.2d 100 (Ind. Ct. App. 2000) involves a joint custody, but it could just as easily have been a visitation situation. In Clark, the Court held that

because the trial court had made no specific finding that the child would be endangered otherwise, the trial court's requirement of the presence of another adult "at all times he cares for the child" was improper. In so finding, the Court employed a de novo review and determined that the trial court misapplied or misinterpreted I.C. 31-17-2-17(b)(1). Id. at 105. I.C. 31-17-2-17(b)(1) provides: "If the court finds after motion by a noncustodial parent that, in the absence of a specific limitation of the custodian's authority, the child's: (1) physical health would be endangered;...the court may specifically limit the custodian's authority." Citing its decision in In Re Marriage of Lang, 668 N.E.2d 285, 288-89 (Ind. Ct. App. 1996) quoting a California Supreme Court case, In Re Marriage of Carney, 24 Cal.3d 725 (1979), the Court also stated:

[It is] impermissible for a court to rely on a parent's physical disability "as prima facie evidence of the person's unfitness as a parent or of evidence of the person's unfitness as a parent or of probable detriment to the child; rather in all cases the court must view the handicapped person as an individual and the family as a whole." To do so, a trial court must examine the parent's "actual and potential physical capabilities, learn how he or she has adapted to the disability and manages its problems, consider how the other members of the household have adjusted thereto, and take into account the special contributions the person may make to the family despite – or even because of – the handicap." Weighing these and all other relevant factors, a trial court must carefully determine whether the parent's condition will in fact have a "substantial and adverse effect on the best interest of the child."

In Clark, the Court noted that the Father, who had been blind since birth, was at that time in his fifties and had lived independently, traveling, completing a degree in computer technology, and founding two successful computer companies of which he was currently the chief executive officer. Id. at 103.

In Marlow v. Marlow, 702 N.E.2d 733 (Ind. Ct. App. 1998), the Court affirmed the trial court's visitation order requiring that, during periods of overnight visitation, the

father was not to have any other non-blood-related person in the house overnight and the father was not to include in the children's activities any social, religious, or educational functions sponsored by or which otherwise promoted the homosexual lifestyle. The Court found that the record revealed a rational basis supporting the visitation restrictions. Id. at 736. The Court noted that (1) the evidence was undisputed that subsequent to the parties' separation, the father changed his lifestyle; (2) the evidence was undisputed that the new lifestyle had an adverse impact on the young five and eight year old children who lacked the cognitive ability to reconcile it with their conservative upbringing; and (3) the trial court did not permanently preclude the father from teaching his children about his lifestyle, it just found that it was in the children's best interests that the issue of sexuality and the discussion thereof should be delayed until each child reached adolescence and had the cognitive ability to understand the information and reconcile it with their conservative upbringing and the past teachings of their parents and church. Id. at 738.

In its decision, the Marlow Court cited Pennington v. Pennington, 596 N.E.2d 305, 306 (Ind. Ct. App. 1992), trans. denied, a case in which the Court affirmed a restriction prohibiting the father's male friend from being present during the father's overnight visitation with his seven-year-old son. It cited to Pennington for the proposition that it is "not puritanical or unreasonable to attempt to shield a child of tender age ... from the sexual practices of the visiting parent, whether those practices are homosexual ... or heterosexual." Id. Such protection is a sound practice designed to foster the child's emotional well-being and is widely employed. Id. In Pennington, the Court concluded that the trial court made a specific finding that the presence of the same-

sex partner would injure the child's emotional development, and that the record revealed a rational basis for the restriction. Id. at 307.

The Court in Downey v. Muffley, 767 N.E.2d 1014 (Ind. Ct. App. 2002) distinguished Marlow when it found no rational basis for, and reversed the trial court's order prohibiting the mother from cohabiting with her same-sex partner while the children were living with her. The trial court had adopted the Indiana Parenting Time Guidelines and additions to them including one prohibiting both parents from allowing "an unrelated adult member of the opposite sex, or the same sex if they are involved in a homosexual relationship with that parent, to spend overnight with them while a child is in their care." The Court found the routine imposition of such an overnight visitation restriction to run counter to I.C. 31-17-4-2, which provides in pertinent part that: "the court shall not restrict a parent's visitation rights unless the court finds that the visitation might endanger the child's physical health or significantly impair the child's emotional development." The Court's review of the record revealed no evidence of any adverse effect upon the children based upon the mother's sexual preference and relationship with a same-sex partner. Id. at 1020. The Court held that the trial court erred by a priori imposing the restriction upon the mother without the requisite finding of harm. Id. at 1021.

In its decision, the Downey Court reviewed cases in which restrictions had been imposed upon both visitation and custody. Id. at 1017-19. In D.H. v. J.H., 418 N.E.2d 286 (Ind. Ct. App. 1981) the Court, confronted with the question of whether the homosexual activity of a mother required a custody award of the children to the father, provided the following guideline: "[We] believe the proper rule to be that homosexuality

standing alone without evidence of any adverse effect upon the welfare of the child does not render the homosexual parent unfit as a matter of law to have custody of the child.” Id. at 1020.

The Downey Court also reviewed, Teegarden v. Teegarden, 642 N.E.2d 1007 (Ind. Ct. App. 1994), as well as other cases. In Teegarden, which was actually a third-party custody dispute, the children’s step-mother challenged the mother’s attempt to obtain custody of the boys after the death of the father, who had been awarded custody in the divorce proceeding. The mother had been awarded regular unrestricted visitation in the divorce proceeding. Id. at 1007. The trial court imposed conditions on its award of custody to the mother: (1) the mother not co-habitate with women with whom she was maintaining a homosexual relationship; and (2) the mother not engage in homosexual activity in front of the children. The Appellate Court held that, had the evidence revealed that the mother flagrantly engaged in untoward sexual behavior in the boys’ presence, the trial court might have been justified in finding her to be unfit and, accordingly, awarding custody to the stepmother. However, the Court found that, without evidence of behavior having an adverse effect upon the children, the trial court had no basis upon which to condition the mother’s custody of her sons. Id. at 1010.

An order restricting visitation to the home of the child’s paternal grandparents was upheld in Hunt v. Whalen, 565 N.E.2d 1109 (Ind. Ct. App. 1991). The Appellate Court held that the order was supported by evidence that the mother’s home was “permeated with substance abuse and violence.” Id. at 1112. For example, the trial court found that the mother’s new husband had beaten her up, that they argued frequently, and that the mother had threatened suicide. The Court stated that “[t]he trial court could have

reasonably concluded that these circumstances, coupled with a history of inadequate food supplies in the home, presented a threat to David's physical health or emotional development." Id.

In Stewart v. Stewart, 521 N.E.2d 956 (Ind. Ct. App. 1988), the Court discussed the term "might" endanger used in I.C. 31-1-11.5-24(b) (recodified at I.C. 31-17-4-1). In footnote 3 of the opinion, the Court stated that it would be an absurd construction to require only a mere possibility of endangerment or impairment to the child's physical or mental health. Id. at 960. The Court instead concluded that the statute requires evidence that visitation "would" endanger or impair the child's physical or mental health. The Court pointed out that case law supports judicial treatment of the word "might" as being more than a mere possibility or an idle hope. Id. The Court also opined, however, that the right of visitation is subordinated to the best interests of the child. Id.

The Stewart Court also discussed what burden of proof was required to rebut the presumption in favor of visitation and concluded that the preponderance of the evidence standard applied. The Court also noted that a parent may obtain modification of visitation as long as evidence is presented which shows a change in circumstances since the last visitation order was entered. Id. Thus, termination of visitation is not permanent, and it does not necessarily prohibit other forms of contact between parent and child, such as telephone and mail contact.

In Carter v. Dec, 480 N.E.2d 564 (Ind. Ct. App. 1985), the Appellate Court held that the trial court's order denying the father visitation was not an abuse of discretion. In Carter, the father was incarcerated and the proposed visitation arrangement required that a stranger take the child to the prison to visit the father. The trial court made a specific

finding that visitation would not be in the child's best interest. The Court found that the order was supported by evidence that the child sometimes cried during the prison visits when the mother had accompanied the child.

In Truden v. Jacquay, 480 N.E.2d 974 (Ind. Ct. App. 1985), the trial court modified the visitation order so that the father's visitation with his three children was restricted to alternate Saturdays with supervision. The Appellate Court upheld the restricted visitation as within the trial court's discretion, holding that the trial court's finding that the children's physical and emotional health were endangered was supported by evidence that (1) the father physically and verbally abused one of the children; (2) the father spanked the three year old whenever he wet himself; and (3) the two younger children had nightmares following each visit with the father.