

Children's Law Center of Indiana



Grandparent Visitation

7/18/2013

In **In Re Guardianship of A.J.A.**, 991 N.E. 2d 110 (Ind. 2013), the Court affirmed the trial court's 2012 order which declared that the trial court's original 2009 order granting grandparent visitation to Grandmother was void. On April 23, 2008, Father murdered his wife, the children's mother, in the presence of the children, who were five years and one year of age. Paternal Uncle and his significant other (Guardians) took immediate custody of the children and filed a petition for guardianship over the persons and estate of the children. The guardianship petition was granted on July 3, 2008, and Grandmother filed a petition to intervene in the guardianship seeking grandparent visitation one week later. Guardians and Grandmother entered into an agreement whereby Grandmother would have a supervised visit each Sunday for one hour with the children over a six week period. During one of the visits, Grandmother took the children to the jail to visit Father, thereby violating the visitation order. Guardians also discovered that Grandmother was violating the criminal court's no contact order prohibiting Father from communicating with the older child. Following Grandmother's violation of the visitation order, Guardians argued that she lacked standing to petition for visitation under the Grandparent Visitation Act. On February 4, 2009, the trial court determined that Grandmother did have standing and granted supervised visitation to her. Guardians filed a motion to correct error and relief from judgment. On July 6, 2009, the trial court issued an Amended Order Approving Petition for Grandparent Visitation, granting limited visitation for Grandmother. Subsequently, hearings were held on Guardians' request to terminate Grandmother's visitation on January 19, 2012, and on March 7, 2012. On March 26, 2012, the trial court issued its order declaring the 2009 grandparent visitation order void and vacated the order for want of subject matter jurisdiction, finding that Grandmother lacked standing because the parents' marriage had not been dissolved by an Indiana court. The trial court order stated that, because the original order was void, Guardians could raise the issue at any time, and the issue was not waived.

The Court held that Grandmother did not meet the statutory definition by which she could seek grandparent visitation rights. *Id.* at 114. The Court quoted IC 31-17-5-1, which currently reads, "[a] child's grandparent may seek visitation rights if: (1) the child's parent is deceased; (2) the marriage of the child's parents has been dissolved in Indiana; or (3) subject to subsection (b), [which requires that paternity must be established for paternal grandparents to seek visitation] the child was born out of wedlock." *Id.* at 113. The Court likened the instant case to In Re Visitation of C.R.P., 909 N.E.2d 1026 (Ind. Ct. App. 2009), *trans. denied*, in which the father killed the mother, and aunt and uncle adopted the child, and the paternal grandmother filed for grandparent visitation. A.J.A. at 113. The Indiana Supreme Court agreed with the Court of Appeals analysis in C.R.P., where the Court of Appeals held that the Grandparent Visitation Act "confers standing only upon grandparents who are the parents of the deceased parent of the

child; thus, since the grandmother was not the parent of the deceased parent, she did not have standing to seek visitation.” C.R.P. at 1028. A.J.A. at 115. The Court also looked to In Re Visitation of J.P.H., 709 N.E.2d 44, 46 (Ind. Ct. App. 1999), in which the Court of Appeals stated that courts will reject an interpretation of a statute which produces an absurd result. A.J.A. at 113.

The Indiana Supreme Court opined that both of Grandmother’s theories would produce an absurd result. Id. The Court said that Grandmother’s first theory, that her son is for all intents and purposes deceased, unfortunately attempts to circumvent the strict interpretation the statute is due and therefore her argument fails. Id. The Court noted that Grandmother’s son is not dead; he is incarcerated with a sixty year sentence for the murder of her grandchildren’s mother. Id. The Court opined that Grandmother’s other theory for grandparent visitation, namely that by virtue of the murder, the marriage was dissolved, produces “an even more nonsensical result.” Id. at 114. The Court said that, “[w]e cannot construe any scenario where the General Assembly intended the Grandparent Visitation Act to potentially require grandparent visitation by the mother of an individual who shot and killed the grandchildren’s other parent.” Id.

The Court held that the trial court’s original 2009 order granting grandparent visitation to Grandmother was void and thus without legal effect; remand cannot cure the defect since Grandmother had no legal right to pursue grandparent visitation under the statute. Id. at 115. The Court, quoting Stidham v. Whelchel, 698 N.E.2d 1152, 1154 (Ind. 1998), observed that “[a] void judgment is one that, from its inception, is a complete nullity and without legal effect[.] By contrast, a voidable judgment is not a nullity, and is capable of confirmation or ratification. Until superseded, reversed, or vacated, it is binding, enforceable, and has all the ordinary attributes and consequences of a valid judgment.” A.J.A. at 114. The Court also quoted M.S. v. C.S., 938 N.E.2d 278, 284 (Ind. Ct. App. 2010), which states, “A voidable judgment or order may be attached only through a direct appeal, whereas a void judgment is subject to direct or collateral attack at any time.” A.J.A. at 114. The Court highlighted two cases, In Re Paternity of P.E.M., 818 N.E.2d 32 (Ind. Ct. App. 2004) and M.S. v. C.S. to illustrate the difference between void and voidable. A.J.A. at 114. In P.E.M., the trial court’s order granting grandparent visitation rights was not properly supported by findings of fact and conclusions of law, but the Court of Appeals correctly held that this was a defect merely in form. A.J.A. at 114. The Indiana Supreme Court noted that in P.E.M., the trial court’s order was merely voidable, and could only be challenged through a direct appeal, which did not happen, thus the right to challenge the order was waived. A.J.A. at 114. The Court contrasted the voidable order with the void order discussed in M.S. v. C.S., 938 N.E.2d 278. A.J.A. at 114. The Court observed that in M.S., the Court of Appeals held that the General Assembly did not intend to allow parents to establish joint custody through IC 31-17-2-3, because that essentially circumvented the Adoption Act. A.J.A. at 114. The Court of Appeals stated in M.S. that the trial court’s order on custody was not merely a procedural error, but the trial court lacked the authority to grant the joint petition, thus the order was void ab initio and without legal effect. M.S. at 284. A.J.A. at 114-15. The Indiana Supreme Court held that in the A.J.A. case the only cure was to hold the original order void ab initio. A.J.A. at 115.