

Children's Law Center of Indiana



Grandparent Visitation

7/28/2014

In **In Re Visitation of A.D.**, 18 N.E.3d 304 (Ind. Ct. App. 2014), the Court affirmed the trial court's order denying grandparent visitation, holding that the trial court properly treated the case as a petition for grandparent visitation instead of a request to modify grandparent visitation, and that Paternal Grandmother did not meet her various burdens of proof regarding grandparent visitation.

Mother and Father had two children together out of wedlock. Father established paternity, but ceased to have any contact with the children after January 2013. Before that point, Paternal Grandmother had seen the children a few times during Father's visitation. Paternal Grandmother asked Mother for time with the children after Father ended his contact with them, but Mother refused, citing safety concerns about Paternal Grandmother, which included drinking alcohol around the children and taking one of them out of his car seat while driving on the highway. Paternal Grandmother filed a petition for grandparent visitation in April 2013. In July 2013, parties agreed to allow Paternal Grandmother to have a trial period of grandparent visitation, with certain conditions imposed upon Paternal Grandmother. The visitation was for two hours on Saturdays, and was supervised by Mother or Paternal Great-Grandparents. Paternal Grandmother was not permitted to drink alcohol or swear or fight in front of the children, and she was required to use proper car seats in vehicles at all times. The trial court approved and ordered this agreement. The visits supervised by Mother were without issue. However, during visits that were supervised by someone other than Mother, Paternal Grandmother allowed the three year old child to be placed on the roof of a shelter and allowed him to ride on a four-wheeler without a helmet. Mother also noticed that the three year old child began using profane language after visits with Paternal Grandmother. At the November 2013 hearing, Paternal Grandmother testified she was not the first parent to engage in these activities, made excuses, shifted the blame to her ex-husband, and eventually admitted to using profane language around the children. Paternal Grandmother did not present any evidence challenging Mother's fitness at the hearing, but insisted that visits went well and that she wanted overnight visits. Mother testified that when visits occurred outside of Mother's supervision, Mother had safety and emotional health concerns for the children.

The trial court issued an order denying grandparent visitation and finding: (1) that Mother was a fit parent; (2) that Mother's and Paternal Grandmother's opinions on how visitation went differed; (3) that until the grandparent visitation trial period agreement, Paternal Grandmother

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had little contact with the children; (4) that Mother testified she would prefer the children to have no visits with Paternal Grandmother; and (5) that the Court had to give some weight to the fact that the children would probably denied all visitation with Paternal Grandmother, but that this did not outweigh the special weight that must be given to Mother's decision in the best interests of the children as a fit parent. Paternal Grandmother appealed.

The Court held that the trial court properly ruled on Paternal Grandmother's petition as a petition for grandparent visitation, and not as a petition to modify grandparent visitation to be determined under a different legal standard. *Id.* at 310. Paternal Grandmother contended that the July 2013 agreed order was a final order on her grandparent visitation, which established her right to grandparent visitation; she argued that, therefore, the trial court should not have applied the difficult legal standard for establishing grandparent visitation, but instead, should have placed the burden on Mother to show that Paternal Grandmother's visitation rights should have been modified. *Id.* at 309-10. In disagreeing with these arguments, the Court observed that Paternal Grandmother had filed a petition for grandparent visitation, and the parties had come to an agreement allowing limited visitation. *Id.* at 310. The Court also noted that the record showed that this was a trial period of visitation, pending a final hearing on the petition. *Id.* The Court opined that this was an agreed provisional order pending a final outcome. *Id.* Lastly, the Court noted that trial court must, in granting or denying grandparent visitation rights, issue findings as instructed in *McCune v. Frey*, 783 N.E.2d 752, 757 (Ind. Ct. App. 2003); since the trial court did not issue findings until its final order from the hearing, that order denying grandparent visitation indicated that it was the hearing on Paternal Grandmother's right to grandparent visitation. *A.D.* at 310. In a footnote, the Court opined that since it had decided that the trial court properly treated this petition as a request for grandparent visitation and not a modification of such visitation, it would not address the question of the allocation of burdens in a grandparent visitation modification actions. *Id.* at 311 n. 2.

The Court determined that Paternal Grandmother made no showing that the trial court made any error in denying her petition for grandparent visitation based on the evidence presented. *Id.* at 311. The Court noted that the following factors must be considered by a trial court in awarding or denying grandparent visitation: "(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." *Id.* at 308-9, citing *In Re Visitation of M.L.B.*, 983 N.E.2d 583, 585-86 (Ind. 2013). The Court, citing previous case law, indicated that it would consider whether the evidence supported the findings, and whether the findings supported the judgement, but would not reweigh the evidence or assess a witness's credibility. *A.D.* at 309. The Court noted that Paternal Grandmother did not make any argument that she had met the burden of showing that grandparent visitation was in the children's best interests, nor did

Paternal Grandmother argue that she had shown that Mother was unfit. Id. at 310. The Court observed that there was very little preexisting relationship between Paternal Grandmother and the children before Mother permitted Paternal Grandmother to have supervised contact with the children. Id. The Court opined that, given the evidence, Paternal Grandmother had been unable to satisfy the heightened standard of proof to rebut the presumption that Mother's decision about contact with Paternal Grandmother was in the children's best interests. Id. 310-11.