

# Children's Law Center of Indiana



## Grandparent Visitation

8/28/2015

In **In Re Visitation of K.M.**, 42 N.E.3d 572 (Ind. Ct. App. 2015), the Court affirmed the trial court's order awarding visitation with the child to Paternal Grandmother (Grandmother). *Id.* at 573. The Court reversed the trial court's ordered visitation schedule, and remanded with instructions for the trial court to craft a new visitation schedule. *Id.* at 582. The child was born to unmarried parents in October of 2012. Between November of 2012 and May of 2013, Grandmother visited the child, who was always accompanied by Mother, about once or twice per month. In May of 2013, Mother ended her relationship with Father as a result of his ongoing substance abuse. In June of 2013, Mother obtained a protective order against Father, which prohibited him from having any contact with Mother or the child. The protective order did not apply to Grandmother, but Grandmother made no attempt to contact Mother or the child out of concern "that such contact would be viewed a[s] indirect contact by Father in violation of the protective order." On February 13, 2014, by agreement of the parties, Father's paternity was established, and he was awarded supervised parenting time and ordered to pay child support. Father died nine days later.

At the time of Father's death, Grandmother had not seen the child in over nine months. A few days after Father's death, Mother, the child, and Grandmother met at a restaurant where they spent several hours visiting, and Mother subsequently took the child to Father's "Celebration of Life" event, where they visited with Grandmother and other members of Father's family. Grandmother saw the child about three more times between March and May of 2014. Grandmother's last visit with the child occurred on May 20, 2014. Grandmother requested an overnight visit with the child, but Mother was uncomfortable with an overnight visit. Mother arranged for Grandmother to pick the child up from daycare and return her to Mother by 8:00 p.m. (according to Mother) or 8:30 p.m. (according to Grandmother). At 8:30 p.m. Grandmother contacted Mother to state that she had lost track of time and was preparing to leave. Grandmother returned the child shortly before 11:00 p.m. (according to Mother) or 10:00 p.m. (according to Grandmother). When Grandmother returned her, the child was wearing only a diaper, was crying, and was covered in vomit. Grandmother explained that she had been unable to clean the child up because Grandmother had forgotten the diaper bag. According to Grandmother, the child had been ill for several days. According to Mother, the child had vomited only because Grandmother had disregarded Mother's instructions not to give the child any milk. Following this visit, Mother ceased communicating with Grandmother and did not permit any further visitation.

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On October 1, 2014, Grandmother filed a Verified Petition for Grandparent Visitation. The trial court conducted a hearing on January 8, 2015 and issued its order granting Grandmother's petition for visitation on February 9, 2015. In concluding that court-ordered grandparent visitation was warranted, the trial court found, *inter alia*, that: (1) Mother did not believe it was important for the child to see Grandmother and had no intentions of establishing or fostering their relationship; (2) Mother would leave it up to the child to determine if she wanted a relationship with Grandmother when the child was old enough to make that decision; (3) Mother testified that she cut off contact with Grandmother because she felt disrespected by Grandmother due to Grandmother's failure to return the child on time; (4) Mother testified that her fiancé's family was sufficient family for the child, and the child did not need to know or have a relationship with Father's family; (5) Mother complained about Grandmother's judgment in encouraging visitation between the child and Father despite evidence that Father had drug issues; (6) Mother's reasons for denying visitation with Grandmother were unreasonable and not in the child's best interests; and (7) Mother acknowledged that Grandmother would be the primary source of information for the child about Father and his family. The trial court awarded Grandmother unsupervised visitation according to the Indian Parenting Time Guidelines with the child.

**The Court could not say that the trial court clearly erred in awarding visitation to Grandmother.** *Id.* at 583. Quoting K.I. Ex Rel. J.I., 903 N.E.2d 453, 462 (Ind. 2009), the Court observed that the Indiana General Assembly enacted the Grandparent Visitation Act and “balanced two competing interests: the rights of the parents to raise their children as they see fit and the rights of grandparents to participate in the lives of their grandchildren.” K.M. at 576. Quoting In Re Visitation of M.L.B., 983 N.E.2d 583, 586 (Ind. 2013), the Court noted that, to protect a parent's fundamental right to direct her child's upbringing, the trial court is required to issue findings of fact and conclusions thereon that address the following four factors: (1) a presumption that a fit parent's decision 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 (emphasis in M.L.B. opinion). K.M. at 576-77. Quoting M.L.B. at 587, the Court explained that “[t]he first three required factors implement the constitutionally protected rights of fit parents to make child rearing decisions, and reflect the significant burden of proof grandparents must carry to override those decisions.” K.M. at 577. In determining the child's best interests, “the court may consider whether a grandparent has had or attempted to have meaningful contact with the child.” M.L.B. at 587. K.M. at 577. The Court noted it was not incumbent upon Mother to *prove* that she acted in the child's best interests; this fact is presumed and “deserves special weight under the law.” (Emphasis in opinion). K.M. at 577-78, quoting In Re Visitation of C.L.H., 908 N.E.2d 320, 329 (Ind. Ct. App. 2009). The Court noted that Mother was not obligated to *prove* misconduct by

Grandmother to justify discontinuing visitation (emphasis in opinion). K.M. at 578, citing In Re Visitation of C.S.N., 14 N.E.3d 753, 759 (Ind. Ct. App. 2014). Quoting Spaulding v. Williams, 793 N.E.2d 252, 260 (Ind. Ct. App. 2003), the Court observed that the “special weight requirement does not require a trial court to take at face value any explanation given by a parent.” K.M. at 578.

Mother claimed the trial court erred because its analysis under each factor revealed that Mother was not properly afforded the presumption that her decision to deny visitation was in the child’s best interest, nor was her decision given the special weight as required by law. Mother argued that the trial court omitted any findings as to Grandmother’s irresponsible choices regarding the child’s health care and that Grandmother had jeopardized the child’s safety by encouraging Father’s interaction with the child despite Grandmother’s knowledge that Father had a problem with drug abuse. The Court found it was clear that the trial court did not simply ignore this evidence as Mother contended, but a review of the record showed at there was inconsistent evidence and conflicting testimony. Id. at 579. The Court observed it was evident that the trial court found Grandmother’s testimony was more credible, and it was well within the trial court’s discretion to discredit Mother’s explanation for terminating visitation. Id.

The Court noted that one of the factors the trial court must address is whether a parent has entirely denied or simply limited a grandparent’s contact with a grandchild. Id. at 579. The Court found the trial court acknowledged that Mother facilitated visits between the child and Grandmother for the first seven months of the child’s life and on several occasions following Father’s death. Id. The Court noted that, following the May 20, 2014 visit, Mother discontinued all forms of contact between Grandmother and the child and testified resolutely that she had no intention to permit visitation until the child was old enough to decide for herself. Id. The Court, quoting In Re Visitation of C.S.N., 14 N.E.3d at 762, said that because of Mother’s complete denial of visitation, the case for judicial intervention was strengthened. K.M. at 579.

Mother further asserted that Grandmother had not demonstrated consistent efforts to have a meaningful role in the child’s life; Grandmother conceded that she had never sent the child a birthday card, Christmas card, or Christmas gift; and Grandmother could not recall the child’s birth date. Quoting In Re Visitation of C.L.H., 908 N.E.2d at 328, the Court said that, while this factor may be considered, whether Grandmother attempted to have meaningful contact with the child “is not a touchstone for determining the child’s best interests.” K.M. at 580.

**The Court concluded that the trial court abused its discretion by ordering a visitation schedule that was excessive and unduly burdensome on both Mother and the child.** Id. at 582. Mother testified that, upon her fiancé’s graduation from U.S. Army Ranger School, they planned to marry, after which she and the child would relocate, depending on the military assignment, which would likely be in Italy or Seattle, Washington. The trial court’s visitation schedule provided for the following: (1) Indiana Parenting Time Guidelines visitation for Grandmother with Mother being present for the first month’s visits; (2) live video conference chatting via Skype, Face Time, or a similar media twice per month; (3) after Mother and her fiancé relocated, visitation would take place one weekend day per month from 9:00 a.m. until

8:00 p.m. until the child became four years old; (4) after the child became four years old, one weekend overnight per month from 9:00 a.m. until 6:00 p.m.; (5) Grandmother would have the option of extending overnights to two consecutive overnights when the child became five years old; (6) if Grandmother were in the child's proximity, Grandmother would have three hours of visitation for every additional 48 hours Grandmother was in the area; (7) after the child reached the age of six, Grandmother would have extended visitation during the child's spring or summer break at least seven days in length; (8) Grandmother would be responsible for all transportation costs of visitation.

Quoting In Re Visitation of L-A.D.W., 38 N.E.3d 993, 997 (Ind. 2015), the Court observed that the Grandparent Visitation Act does not specify "what amount of visitation is appropriate for a trial court to award after it has determined that court-ordered visitation is merited." K.M. at 580. Quoting K.I. Ex Rel. J.I., 903 N.E.2d 453, 462 (Ind. 2009), the Court said it is clear that "[t]he Grandparent Visitation Act contemplates only 'occasional, temporary visitation' that does not substantially infringe on a parent's fundamental right 'to control the upbringing, education, and religious training of their children.'" K.M. at 580. Quoting Visitation of L-A.D.W., 38 N.E.3d at 998-999, the Court observed that: (1) "sole reliance upon the [Indiana Parenting Time] Guidelines is impermissible"; (2) a visitation schedule that is *similar* to the Parenting Time Guidelines without more does not "require finding and abuse of discretion"; and (3) whether the trial court has abused its discretion in crafting a visitation schedule "is best determined upon the specific circumstances of each case." K.M. at 581. Mother claimed the trial court abused its discretion in the amount of visitation that Grandmother was awarded. The Court agreed with Mother that the order for the parties to follow Indiana Parenting Time Guidelines until Mother and the child relocated was excessive. Id. at 581-82. The Court found that, unlike the Visitation of L-A.D.W. case, where the grandparents provided primary care for the child for significant periods of time, in the instant case, Grandmother enjoyed only sporadic visits with the child, during which Mother was always present, there had been significant gaps in Grandmother's contact with the child, and Grandmother had never been around at the child's bedtime to know the child's nightly routine. Id. at 582. The Court observed that, in general, the parties' earlier pattern of visitation suggested an amount of visitation that might be awarded without unduly interfering in Mother's fundamental right to direct the child's upbringing. Id. The Court noted that it did not appear that the trial court took into consideration the logistics of requiring a visitation schedule that would involve cross-country or trans-Atlantic travel for a toddler *every* month (emphasis in opinion). Id. The Court found that the trial court's visitation schedule would undoubtedly place an unreasonable burden on both Mother and the child. Id.

Mother also challenged the order requiring Grandmother and the child to engage in live video-conferencing two times each month. Noting that the order did not restrict Mother's authority to set reasonable limits on these interactions, the Court found no abuse of discretion regarding the order on twice-monthly video chatting. Id. at 583.