

On 3/7/13. the Indiana Supreme Court issued a new opinion, authored by Justice Rush, under case no. 49S01-1209-MI-00556. The appeal originated from an Order issued by the Honorable Kevin M. Barton, Judge of the Johnson County Superior Court No. 1.

Here is a **link** to the Supreme Court opinion issued on March 7, 2013, "*In Re: Visitation of M.L.B; K.J.R. v. M.A.B*":

<http://www.in.gov/judiciary/opinions/pdf/03071301LHR.pdf>

A child, M.L.B ("child") was born to K.J.R. ("Mother") and M.D.B. ("Father") in 2004. The parents never married. Paternity was established in 2008. Father did not pursue parenting time and has not had contact with child since 2007.

However, Father's extended family, including M.A.B. ("Paternal Grandfather") visited child while at the hospital, after birth, and at least two to three times per week during child's early years. Mother allowed this frequent contact, including allowing Paternal Grandfather to participate in extended-family functions, even after she married P.R. ("Stepfather") in 2006. However, she insisted Father not be allowed to participate in these events beginning in 2007.

In early 2010, Stepfather began adoption proceedings regarding child. Mother "curtailed" Paternal Grandfather's visits after that date. Father contested his son's adoption. Paternal Grandfather intervened for the purposes of obtaining a grandparent visitation order.

Mother testified, at consolidated hearing on both visitation and the adoption, that she had no objection to continued visitation between child and Paternal Grandfather.

After hearing, the trial court issued an order giving Paternal Grandfather the following contact with Child: 1) one weekend per month from Friday evening to Sunday evening; 2) "summer vacation of up to 10 days" in lieu of a monthly visit; 3) ten hour on Easter, Thanksgiving, and Christmas; and 4) a 10 hour visit within a week of child's birthday.

The order did not impose restrictions on Father's contact with child during Paternal Grandfather's visitation though Father's parental rights were terminated the next day by a separate order granting Stepfather's Petition for Adoption.

Father appealed the trial court's decision and lost his appeal by decision issued by the Court of Appeals on June 14 2012. But, because the visitation order for Paternal Grandfather had been issued, first, Paternal Grandfather's rights survived the adoption action.

Mother appealed the trial court's order. A divided panel of the Court of Appeals affirmed. The Ind. Supreme Court then granted a Petition for Transfer.

Indiana Courts did not recognize even limited rights for grandparent visitation until 1981. See *Krieg v. Glassburn*, 419 N.E.2d 1015, 1018-19, (Ind.Ct.App. 1981) (Ind. T.R. 24(A(2) allowed grandparents to intervene as a matter of right in post-dissolution custody and step-parent adoption proceedings and in petitions for visitation).

The Indiana Legislature then passed Indiana's first Grandparent Visitation Statue, Ind. Code 31-1-11.7-1-8 in 1982. Other than expanding this statute, to include grandparents of children born out of wedlock, the substance remains "...largely unchanged" despite the recodification in 1997 to the present location at Indiana Code 31-17-5.

Subsequently, the U.S. Supreme Court addressed the issue of grandparent visitation rights in *Troxel v. Granville*, 530 U.S. 57 (2000). The U.S. Supreme Court opinion discussed the tension between the rights of grandparents and the fundamental right of a fit parent to direct his or her child's upbringing.

In interpreting *Troxel*, the Indiana Court of Appeals later "distilled" the principles of *Troxel* into four factors that a grandparent visitation order "should address," including the following factors quoted in the instant opinion:

"(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 the non-parental 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.

McCune v. Frey, 783 N.E.2d 752, 757-59 (Ind. Ct. of App. 2003), *citing Crafton v. Gibson*, 752 N.E.2d 78, 96-98 (Ind. Ct. App. 2001)."

The Indiana Supreme Court later approved the four factors listed above from *McCune*, as well as added an additional step that a grandparent visitation order "must address" those factors in the findings and conclusions in a 2009 case, *In Re: K.I.*, 903 N.E.2d 453, 462 (Ind. 2009). *K.I.* also held that (the) "*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.*" *Id.*

Applying the *K.I.* principals, to the trial court's findings, in the instant case, the Ind. Supreme Court found the findings were "*incomplete.*" As a result, the trial court's order was "*...not constitutionally permissible.*" The trial court's order was "*insufficient*" **as to the first three factors** listed above. The **fourth factor**, whether such visitation was in the child's best interests, was satisfied by the trial court's order.

Regarding the **third factor**, the Ind. Supreme Court found that Mother had merely limited the amount of Paternal Grandfather's visitation in the months leading up to trial. Mother rarely allowed overnight visitation and never allowed any extended out of state trips between Paternal Grandfather and child. Quoting from the Indiana Supreme Court decision, "***Though the trial court was within its discretion to order some degree of visitation to ensure that [child's] relationship with [Paternal Grandfather] would continue, the amount of visitation far exceeds the parties' earlier pattern. It even exceeds what [Paternal Grandfather] requested in this action....***" (emphasis added). In addition, the trial court's order gives no consideration to Mother's previously-imposed restriction that Father not be present during Paternal Grandfather's visits.

Held: "*[D]espite the trial court's ample 'best interests' findings, the lack of findings on the other three factors, both standing alone and as compounded by the extensive visitation awarded without those necessary findings, violates Mother's fundamental right to direct [child's] upbringing.*"

The Indiana Supreme Court then addressed the appropriate remedy after determining that the trial court's order was defective. "*Even though the trial court's findings are insufficient, that does not render its order void - that is, 'of no effect whatsoever,....incapable of confirmation or ratification.'*" *In Re: Paternity of P.E.M.* 818 N.E.2d 32, 36-37 (Ind. Ct. App. 2004).

Held: The Indiana Supreme Court remanded the instant case to the trial court for new findings and conclusions considering all four of the factors cited in *McCune* and *K.I.*

Note that the Indiana Supreme Court stated, "*it is not our goal to impose a rigid formalism under which any order that recites enough of *Troxel's* 'magic words' will be affirmed.*" The opinion stated that there must also be an analysis of how the evidence received by the trial court fit within the four factors listed above.

The Indiana Supreme Court's decision was unanimous.

Sincerely,

Patty McKinnon, Esq.

phone: [317-686-1900](tel:317-686-1900), ext. #231

pmckinnon@indianafamilylawyer.com