

Children's Law Center of Indiana



Custody and Parenting Time (Grandparent Visitation)

4/9/14

In **K.L. v. E.H.**, 6 N.E 3d 1021 (Ind. Ct. App. 2014), the Court affirmed the trial court's order which granted visitation with Mother's one-year-old child to the Paternal Grandfather (Grandfather). Mother and Father began their relationship in April 2011, and Grandfather and his family welcomed Mother, who occasionally went to Grandfather's house. On October 15, 2011, Father committed suicide while Mother was pregnant with his child. On October 28, 2011, Mother filed a verified petition to establish paternity of their unborn child, who was due to be born on April 13, 2012. Mother moved back in with her former husband on December 27, 2011. Mother and Grandfather met at Grandfather's house for a talk in early 2012, during which Grandfather apologized for not contacting Mother sooner. On March 10, 2012, Mother had a baby shower, and she invited Grandfather's family and his wife (Stepgrandmother). Grandfather and his daughters attended the shower. Mother's child was born on April 4, 2012. On Mother's texted invitation, Grandfather and Stepgrandmother visited Mother and the child in the hospital. In early June 2012, Mother brought the child to Grandfather's house. After that visit, Grandfather requested on multiple occasions via text messages to see the child, but Mother did not grant any of Grandfather's requests. Grandfather also requested a picture of the child, but Mother did not provide one. On August 16, 2012, Grandfather filed a verified motion to intervene in the paternity action alleging that he was the child's paternal grandfather; Father was a Navy veteran and the child might be entitled to Social Security and military benefits; and that Grandfather desired visitation with the child. On October 8, 2012, the court entered a paternity decree finding that Father was the child's biological father. On January 17, 2013, Grandfather filed a verified petition for grandparent visitation.

The court heard partial evidence regarding Grandfather's petition for visitation on January 25, 2013. Stepgrandmother testified that she raised her and Grandfather's five children together, that she works as a special education teacher for Noblesville Schools, and that she supported Grandfather obtaining visitation. Grandfather testified that he works for the Department of Homeland Security, that his family welcomed Mother when she and Father were in a relationship, that he did not have much contact with Mother shortly after Father died because he needed time to grieve, and that he took care of his children on his own for two to three years, changed their diapers, bathed them, and fed them. After hearing the testimony of Stepgrandmother and Grandfather, the court indicated that it wanted the parties to speak with a family counselor or therapist. The court compared the arrangement with civil mediation, and said

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that neither parent could bring the mediator into court to testify on what was discussed, that anything the parties said during the counseling would be completely confidential, and required Grandfather to pay for the cost of the counselor. On February 11, 2013, the court entered an order requiring the parties to participate in counseling. On March 6, 2013, Grandfather requested that the court appoint a counselor, and the court appointed Mary Halliday. The counseling was unsuccessful in reaching an agreement, and the court held another hearing on May 3, 2013. At the beginning of the hearing, Mother's counsel moved to introduce the testimony of Halliday that Grandfather terminated the counseling, that progress was being made, and that she felt that if they had continued, the parties could have developed the trust necessary to make a functioning and workable agreement. The court denied Mother's request to call Halliday to testify because the court had sent the parties to a counselor in the form of a mediation. The court indicated that it wanted the parties to be free to discuss things without the counselor testifying. Mother testified, *inter alia*, that she lives with her former husband and the child, and works as an independent subcontractor performing in-home interventions with autistic children on Mondays through Thursdays from about 8:15 a.m. until 4:00 or 5:00 p.m. and every other Friday from 9:00 a.m. until 5:00 p.m.; that she had four or five face-to-face interactions with Grandfather at family gatherings prior to Father's death but did not really converse with him; that the relationship between Grandfather and his daughter did not seem very warm; and that Grandfather was void of emotion. Mother expressed worry that Grandfather would cause something negative in her relationship with her child, and a "big fear" was that the opportunity to tell her child about Father would be taken out of her hands. Mother expressed her trust issues with Grandfather and her concern about the child's need to have putty inserted into her ears before taking a bath; she had not had enough interaction with Grandfather to be able to say whether he would follow directions.

The trial court granted Grandfather's petition for visitation on July 15, 2013. The court's findings and conclusions were: (1) the court afforded little to no weight to concerns expressed by Mother as to why she desires that Grandfather have no contact with the child; (2) the child appears to be normal and healthy; (3) there was no evidence that the child would be unsafe in Grandfather's care or that Grandfather's contact would negatively influence the child; (4) Grandfather and his family would provide the child with meaningful familial relationships and experiences that would be in the child's best interests; (5) the court had considered the presumption that a fit parent acts in his or her child's best interests, the special weight that must be given to a fit parent's decision to deny or limit visitation, whether the grandparent had established that visitation is in the child's best interests, and whether the parent had denied visitation or had simply limited visitation. The court ordered that Grandfather would have visits with the child on the second and fourth Sunday of each month for two hours, with visitation to be supervised by Mother for the first two months. The court ordered that, after four months, the visitation would increase to three hours in duration. The court also ordered that Grandfather may inform the child that he is her grandfather, but shall not advise the child that his son is her father at this time and without further court order. The court encouraged Mother to develop a plan as to how and when she will advise the child about her father, and said that the matter should first be addressed between the parties and with a child counselor, and then presented to the court if agreement is not reached. Mother appealed.

The Court could not say that the trial court abused its discretion in excluding the testimony Mother wished to elicit from the counselor who was appointed by the court to act in the role of mediator. Id. at 1031. In support of her argument that the trial court abused its discretion in excluding Halliday’s testimony, Mother asserted that: (1) the court made it clear that it did not order mediation subject to the Rules of Alternative Dispute Resolution; (2) evidence that Grandfather sabotaged the process ordered by the court was clearly relevant to whether Grandfather could be relied upon to put the child’s best interests above his own; (3) even if the settlement proceedings were treated as mediation, neither the Rules of Alternative Dispute Resolution nor the Rules of Evidence would require excluding evidence of Grandfather’s behavior in walking out of the therapy sessions; (4) any public policy served by keeping a party’s behavior in settlement discussions confidential must give way to the need to assess behavior and temperament of an adult who seeks to be put in charge of a child. Citing In Re A.J., 877 N.E.2d 805, 813 (Ind. Ct. App. 2007), *trans. denied*, the Court noted that the admission of evidence is entrusted to the sound discretion of the trial court. K.L. at 1030. The Court looked to Ind. Evidence Rule 408, which provides, *inter alia*, that evidence of conduct or statements made in compromise negotiations is not admissible. Id. at 1030 n.1. The Court also noted Ind. Alternative Dispute Resolution Rule 2.11, which provides that: (1) mediation shall be regarded as settlement negotiations as governed by Ind. Evidence Rule 408; and (2) *mediators shall not be subject to process requiring the disclosure of any matter discussed during the mediation, but rather, such matter shall be considered confidential and privileged in nature* (emphasis in opinion). Id. at 1030-31. Quoting Horner v. Carter, 981 N.E.2d 210, 211 (Ind. 2013), the Court observed that “Indiana policy *strongly favors* the confidentiality of *all matters* that occur during mediation.” (Emphasis added). K.L. at 1031. The K.L. Court noted that the trial court made it clear to the parties that their statements made during mediation would be confidential and the mediator/counselor could not testify. Id.

The Court could not say that the trial court abused its discretion in granting Grandfather’s petition for visitation. Id. at 1034. The Court, citing In Re Visitation of M.L.B. 983 N.E.2d 583, 584 (Ind. 2013), observed that a child’s relationship with her grandfather is important and can deserve protection under the Grandparent Visitation Act. K.L. at 1031. The Court further said that an order granting grandparent visitation necessarily impinges, to some degree, on a parent’s constitutionally protected rights and must therefore include findings that address the four well settled factors for balancing parents’ rights and the child’s best interests, and must limit the visitation award to an amount that does not substantially infringe on parents’ rights to control the upbringing of their children. K.L. at 1031, citing M.L.B. at 584. Citing In Re K.I., 903 N.E.2d 453, 462 (Ind. 2009), the Court noted that, although the amount of visitation is left to the sound discretion of the trial court, 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. K.L. at 1031. The Court said that Indiana courts have distilled four factors that a grandparent visitation order should address:

- (1) a presumption that a fit parent’s decision about grandparent 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 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.

K.L. at 1032, citing M.L.B. at 586. The Court, quoting Spaulding v. Williams, 793 N.E.2d 252, 260 (Ind. Ct. App. 2003), noted that the “special weight” requirement does not require a trial court to take at face value any explanation given by a parent. K.L. at 1032.

The Court observed that the trial court here acknowledged the presumption that a fit parent acts in his or her child’s best interests, as well as the other three required factors. Id. at 1034. The Court also noted the following evidence in support of its order affirming the trial court’s decision: (1) members of Father’s family attended a baby shower for the child; (2) Mother invited Grandfather and members of his family to the hospital after the child’s birth; (3) Mother brought the child to Grandfather’s home to visit in early June; (4) Grandfather had made multiple requests to have further contact with the child, which Mother ignored or denied; (5) there was no evidence that the child would be unsafe in Grandfather’s care; (6) Grandfather and his family could and would provide the child with meaningful familial relationships and experiences that are in the child’s best interests. Id. at 1033-34.