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IN THE
COURT OF APPEALS OF INDIANA

In Re: The Grandparent Visitation of B.A.A.;

K.T.A.,

Appellant-Respondent,

v.

R.A. and M.A.,

Appellees-Petitioners.

June 28, 2021

Court of Appeals Case No. 21A-MI-258

Appeal from the Hamilton Superior Court

The Honorable William J. Hughes, Judge

Trial Court Cause No. 29D03-2008-MI-5429

Pyle, Judge.

Statement of the Case

[1] K.T.A. ("Mother") appeals the trial court's grant of grandparent visitation to R.A. ("Paternal Grandfather") and M.A. ("Paternal Grandmother") (collectively "Paternal Grandparents"). Mother specifically argues that the trial court's findings of fact and conclusions thereon are inadequate to support the

grandparent visitation order. We agree and remand the case to the trial court for new findings and conclusions as required by *In re Visitation of M.L.B.*, 983 N.E.2d 583 (Ind. 2013), without hearing new evidence.[1]

[2] We remand with instructions.[2]

Issue

> Whether the trial court's findings of fact and conclusions thereon are inadequate to support the grandparent visitation order.

Facts

[3] Mother and A.A. ("Father") (collectively "Parents") were married in June 2019. After the wedding, Parents moved in with Paternal Grandparents in Indianapolis so that Parents could save money to purchase their own home. Parents' son, B.A. ("B.A."), was born in October 2019. Paternal Grandmother provided childcare for B.A. while Mother and Father worked during the day.

[4] In April 2020, Mother and Father purchased a home. Paternal Grandmother continued to provide childcare for B.A. while Parents worked. In addition, because there were several maintenance issues in Parents' newly purchased

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[1] Mother also argues that there is insufficient evidence to support the grandparent visitation order. Because we are remanding the case for new findings of fact and conclusions thereon, we do not address this issue.

[2] Mother filed motions to stay in the trial court and this Court. This Court's motions panel denied Mother's motion. However, "[i]t is well established that we may reconsider a ruling by the motions panel. Although we are reluctant to overrule orders decided by our motions panel, we have inherent authority to reconsider any motions panel decision while an appeal remains pending." *Core v. State*, 122 N.E.3d 974, 976 (Ind. Ct. App. 2019) (cleaned up). We exercise that authority today and grant Mother's motion to stay in an order issued contemporaneously with this opinion.

home, including plumbing problems and mold, B.A. continued to spend most nights at Paternal Grandparents' home. In June 2020, Father committed suicide by walking into traffic after having dinner with Mother. Immediately thereafter, Mother and B.A. moved in with her parents ("Maternal Grandparents") in Arcadia, which is located approximately forty-five minutes from Indianapolis.

[5] Following Father's death, B.A. had an overnight visit with Paternal Grandparents in June 2020 and another overnight visit in July 2020. Paternal Grandparents also visited B.A. at Maternal Grandparents' home in July 2020 and again in August 2020. During the summer of 2020, Paternal Grandmother texted Mother daily requesting more visits with B.A. Mother did not personally respond to these text messages, but she had Maternal Grandfather communicate with Paternal Grandmother on her behalf.

[6] In August 2020, Paternal Grandparents filed a petition for grandparent visitation pursuant to INDIANA CODE § 31-17-5-1. In their petition, Grandparents alleged that "Mother ha[d] refused to communicate with [them] and ha[d] only allowed them to see [B.A.] for a few short visits, supervised by Maternal Grandparents." (App. Vol. 2 at 21). Paternal Grandparents further alleged that it was in B.A.'s "best interests to continue to have frequent and regular contact" with them. (App. Vol. 2 at 21).

[7] Mother filed a response to Paternal Grandparents' petition. In her petition, Mother alleged that she had granted Parental Grandparents the opportunity to

visit with B.A. Mother also alleged that, "as a parent[, she was] presumed to know the appropriate amount of contact for" B.A. and Paternal Grandparents. (App. Vol. 2 at 25).

[8] In September 2020, Mother and Paternal Grandparents agreed to a preliminary visitation schedule, and the trial court entered a preliminary agreed entry. Specifically, Mother and Paternal Grandparents agreed Parental Grandparents would have visitation with B.A. for three hours on alternating weekends at Maternal Grandparents' home.

[9] The trial court held a hearing on Paternal Grandparents' grandparent visitation petition in January 2021 and heard the evidence as set forth above. In addition, Paternal Grandmother testified that she and Paternal Grandfather had filed their petition because they had not been "allowed any access to B.A." (Tr. Vol. 2 at 42). Parental Grandparents have never alleged, either in their petition or at the hearing, that Mother was unfit.

[10] Also at the hearing, Mother testified that she had never denied Paternal Grandparents visitation with B.A. Mother further testified that Paternal Grandparents' daily texts had been overwhelming because they had "constantly remind[ed] [her] that [her] husband was dead." (Tr. Vol. 2 at 74). Mother had therefore asked Maternal Grandfather to communicate with Paternal Grandparents on her behalf. Mother also testified that her grandparents provided daily childcare for one-year-old B.A. in Arcadia when she worked.

Mother anticipated that when B.A. was older, she would allow him to spend more time with Paternal Grandparents.

[11] In February 2021, the trial court issued an order that included several pages of findings detailing the care that Paternal Grandparents had provided for B.A. before Father's death. Thereafter, the trial court awarded Paternal Grandparents the following visitation: (1) one day per week in their Indianapolis home when Mother is working; and (2) one Saturday overnight visit in their home every third weekend from noon on Saturday until noon on Sunday.

[12] Mother now appeals the trial court's visitation order.[3]

Decision

[13] Mother argues that the trial court's findings and conclusions thereon are inadequate to support the grandparent visitation order. We agree.

[14] Historically, grandparents had no special common-law right to have visitation with a grandchild. *M.L.B.*, 983 N.E.2d at 585. In 1982, the Indiana General Assembly enacted Indiana's first Grandparent Visitation Statute. *Id*. (citing IND. CODE §§ 31-1-11.7-1 to 8).[4] This statute provides the exclusive basis for a grandparent to seek visitation and is currently available only if: (1) the child's

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[3] Mother filed motions to stay in the trial court and this Court. Both motions were denied.

[4] In 1997, the statute was recodified to its current location at INDIANA CODE § 31-17-5. *M.L.B.*, 983 N.E.2d at 585.

father or mother is deceased; (2) the child's parents have divorced; or (3) the child was born out of wedlock and the child's father has established paternity. *See* IND. CODE § 31-17-5-1.

[15] "In the same time frame [that the Indiana General Assembly enacted our state's Grandparent Visitation Statute], many other states also created statutory grandparent-visitation rights, affording varying degrees of deference to natural parents' decisions about grandparent involvement[]" in their children's lives. *M.L.B.*, 983 N.E.2d at 585-86. Ultimately, in *Troxel v. Granville*, 530 U.S. 57 (2000), the United States Supreme Court addressed the tension between grandparents' emerging rights and the fundamental right of fit parents to direct their children's upbringing. *Id*. at 586. The *Troxel* case specifically acknowledged that "because 'grandparents and other relatives undertake duties of a parental nature in many households,' children's relationships with grandparents may deserve protection." *Id*. (quoting *Troxel*, 530 U.S. at 64). "Nevertheless, *Troxel* broadly agreed that natural parents have a *fundamental* constitutional right to direct their children's upbringing without undue governmental interference, and that a child's best interests do not necessarily override that parental right." *M.L.B.*, 983 N.E.2d at 586. (emphasis added).

[16] "In striking a balance between parental rights and children's interests, the *Troxel* plurality discussed several key principles, *see* 530 U.S. at 64[.]" *Id*. In *McCune v. Frey*, 783 N.E.2d 752 (Ind. Ct. App. 2003), this Court distilled these key principles into the following four factors that a grandparent-visitation order "should address":

> (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.

M.L.B., 983 N.E.2d at 586 (citing *McCune*, 783 N.E.2d at 757-59. (emphasis in the original).

[17] The Indiana Supreme Court approved of these four factors in *In re K.I.*, 903 N.E.2d 453 (Ind. 2009), and took the additional step of declaring that a grandparent-visitation order "*must* address" these factors in its findings of fact and conclusions thereon.[5] *K.I.*, 903 N.E.2d at 462. (emphasis added). In conjunction with that requirement, the Indiana Supreme Court further explained that the "Grandparent Visitation Act contemplates only occasional, temporary visitation that does not substantially infringe on a parent's

[5] Pursuant to IND. CODE § 31-17-5-6, the trial court is required to enter findings of fact and conclusions thereon in a grandparent visitation order.

fundamental right to control the upbringing, education, and religious training of their children." *M.L.B.*, 983 N.E.2d at 586.

[18] Our application of these principles to the facts of this case leads us to conclude that, despite Paternal Grandparents' strained interpretation to the contrary, the trial court's findings of fact and conclusions thereon are inadequate. "[T]rial courts *must* consider all four *Troxel* principles, as distilled by *McCune* and made mandatory by *K.I.*" *M.L.B.*, 983 N.E.2d at 586. (emphasis added).

[19] As the Indiana Supreme Court explained in *M.L.B.*, "[t]he first three factors implement the constitutionally protected right of fit parents to make child rearing decisions, and reflect the significant burden of proof grandparents must carry to override those decisions." *Id*. at 587. Here, our review of the trial court's order in this case reveals that it is insufficient as to all three of the required factors.

[20] As to the first two factors, none of the trial court's findings give any indication that it recognized the "presumption that a fit parent acts in his or her child's best interests," or gave "special weight . . . to a fit parent's decision to deny or limit visitation." *See id*. (citing *K.I.*, 903 N.E.2d at 462). The Indiana Supreme Court has explained that these factors are "key to a constitutionally appropriate balance between a natural parent's fundamental rights and a child's best interests – and without findings reflecting that balance, a grandparent-visitation order is not constitutionally permissible." *M.L.B.*, 983 N.E.2d at 587. These omissions, standing alone, render the trial court's order unconstitutional. *See id*.

[21] In addition, the trial court's order in this case failed to address the third factor, whether Mother had denied Paternal Grandparents visitation or had simply limited it. "If visitation has been denied unreasonably, then the stakes are whether the child will have *any* relationship with the grandparents, *McCune*, 783 N.E.2d at 759, which may strengthen the case for judicial intervention." *M.L.B.*, 983 N.E.2d at 587. (emphasis in the original). However, where, as here, a parent has already offered visitation voluntarily, "it is not the existence of a relationship at stake, but only *on whose terms* it will be." *Id*. (emphasis in the original). "In that event, a grandparent-visitation order particularly implicates the danger of 'infring[ing] on the fundamental right of parents to make child rearing decisions simply because [a court] believes a "better" decision could be made.'" *Id*. (quoting *Troxel*, 530 U.S. at 72-73).

[22] "[W]hen a trial court fails to issue specific findings in accordance with *McCune*, the order is *voidable*, and the remedy on appeal is a remand to the trial court instructing it to enter a proper order containing the required findings." *M.L.B.*, 983 N.E.2d at 588. (internal citation omitted; emphasis in the original). Because the trial court in this case has failed to issue the required specific findings, we remand this case to the trial court for the entry of new findings and conclusions revealing its consideration of all four relevant factors as required by *M.L.B.*, without hearing new evidence. *See id*. at 589.

[23] Remanded with instructions.

Najam, J., and Tavitas, J., concur.