ATTORNEY FOR APPELLANTS

Michael R. Auger
Franklin, Indiana

ATTORNEY FOR APPELLEE

Donna J. Jameson
Greenwood, Indiana

IN THE
COURT OF APPEALS OF INDIANA

Daniel Welbourne, et al.,
Appellants-Respondents,

v.

Betty Mays,
Appellee-Petitioner.

February 18, 2021

Court of Appeals Case No. 20A-MI-1001

Appeal from the Johnson Superior Court

The Honorable Kevin M. Barton, Judge

Trial Court Cause No. 41D01-1912-MI-292

Bailey, Judge.

Case Summary

[1] Daniel Welbourne and Laurey Welbourne ("Maternal Grandmother"), guardians of M.M. ("Child") (collectively, "Guardians"), appeal an order granting grandparent overnight visitation rights to Betty Mays, Child's paternal grandmother ("Grandmother"). Although there is some evidentiary support for grandparent visitation, there is an absence of particularized findings necessary to evaluate the propriety of the order. Therefore, we remand for further proceedings consistent with this opinion.

Issues

[2] Guardians present two issues for review:

I. Whether the trial court's findings and conclusions incorporate an incorrect legal standard in that the order states that Guardians do not possess the constitutional rights of parents with entitlement to have their visitation wishes specifically accorded great weight; and

II. Whether sufficient evidence supports the order for grandparent visitation.

Facts and Procedural History

[3] In December of 2016, Child was born to L.M. ("Mother") and W.M. ("Father"). From her birth until March of 2017, Child lived with her parents at the residence of Guardians, who are Mother's mother and stepfather. From March of 2017 until July of 2017, Child lived with her parents and

Grandmother. After a family dispute, Grandmother moved out and Child remained in the legal custody of her parents. However, the parents struggled with drug abuse and frequently needed assistance with parenting responsibilities. Over several months, Grandmother, Guardians, and a paternal aunt ("Aunt") and her fiancée provided physical care and financial support for Child, with Aunt as the primary caretaker.

[4] In 2018, Aunt and Guardians filed competing petitions for guardianship of Child and Grandmother informally requested visitation. On May 15, 2018, Guardians were appointed as Child's temporary guardians. The trial court order stated that both parents had agreed to the guardianship arrangement, Mother was in substance abuse treatment, and the trial court had been convinced that Guardians favored parent-child reunification.

[5] On November 12, 2018, Guardians were awarded permanent guardianship of Child. Father had consented to the guardianship; Mother's whereabouts were unknown to the court. The order addressed Grandmother's request for visitation, observing that Guardians had consented to visitation and ordering that visits would take place by agreement of Guardians, Aunt, and Grandmother. Aunt was to provide transportation. The order specified that, in the event there were visitation disputes, the trial court would conduct a hearing pursuant to Indiana's grandparent visitation statutes.

[6] Guardians and Grandmother arranged some visits, but a dispute soon arose. In December of 2018, Grandmother took Child to a holiday tree lighting

ceremony which Father also attended.[1] Visits resumed in March of 2019. Guardians placed a GPS device in Child's diaper bag and came to believe that Grandmother was taking Child to Father's place of employment, a Waffle House. In May of 2019, Grandmother took Child to the Waffle House when Father was working. The parties disputed whether Guardians had agreed to this encounter without Guardians being present.[2] Thereafter, Guardians insisted that Grandmother could visit Child only at Guardians' home. Maternal Grandfather maintained some contact with Grandmother but, according to his testimony, "quit texting her back" because she "kept asking if she could take [Child] out of the house." (Tr. Vol. II, pg. 100.)

[7] On May 20, 2019, Guardians filed a petition to adopt Child. On December 19, 2019, Grandmother intervened by filing a petition for grandparent visitation pursuant to Indiana Code Section 31-17-5-1.[3] The trial court conducted a hearing on March 11, 2020, at which Grandmother and the Guardians testified.

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[1] Grandmother's testimony was that Guardians knew Father would be at the ceremony. The trial court did not enter a factual finding as to this contention.

[2] Grandmother testified that Guardians allowed the visit with Father at the Waffle House. Maternal Grandmother's testimony was that Grandmother had asked permission to take Child and let her say goodbye to Father, and Maternal Grandmother had responded that she had "no problem" but she "had to be there." (Tr. Vol. II, pg. 81.) According to Maternal Grandmother, she had instructed Grandmother to contact her if Father showed up, so that Maternal Grandmother could proceed to the restaurant and supervise the encounter. The trial court did not make a factual finding as to whether Guardians did or did not give Grandmother permission to take Child to the restaurant, as she claimed. But the trial court observed that the visit to the Waffle House was in contravention of a court order that provided that Father's parenting time with Child was to be supervised.

[3] Indiana Code Section 31-17-5-1(3) provides that a child's grandparent may seek visitation rights if the child was born out of wedlock and paternity has been established. Here, Father's paternity was established by affidavit. Pursuant to Indiana Code Section 31-17-5-9(2)(A), an order for grandparent visitation survives the adoption by another grandparent.

Grandmother testified that she desired bi-weekly overnight visitation and Maternal Grandmother testified that she wanted Grandmother to have no visitation because she believed Grandmother to be untruthful. On April 14, 2020, the trial court issued an order granting Grandmother visitation with Child six weekends per year, one week per summer, and twelve hours in proximity to Child's birthday and Christmas. Guardians now appeal.

Discussion and Decision

Standard of Review

[8] On appeal, we afford trial courts a great deal of deference in family law matters because of their opportunity for extended face-to-face interactions with the parties. *Best v. Best*, 941 N.E.2d 499, 502 (Ind. 2011). Trial judges are able to assess the credibility and character of the parties involved, and, because of this evidence, they are in a superior position to resolve a best interests dispute. *Id*. As such, we review a trial court's order on grandparent visitation for an abuse of discretion. *K.L. v. E.H.*, 6 N.E.3d 1021, 1031 (Ind. Ct. App. 2014). An abuse of discretion occurs when the trial court's decision is clearly against the logic and effect of the facts and circumstances presented. *In re Guardianship of Morris*, 56 N.E.3d 719, 723 (Ind. Ct. App. 2016).

[9] Additionally, Indiana Code Section 31-17-5-6 requires that an order for grandparent visitation be accompanied by specific findings of fact and conclusions of law. Accordingly, we apply the two-tiered Indiana Trial Rule 52 standard of review. *In re Visitation of M.L.B.*, 983 N.E.2d 583, 585 (Ind. 2013).

We first determine whether the evidence supports the findings, and then whether the findings support the judgment. *In re K.I.*, 903 N.E.2d 453, 457 (Ind. 2009). We set aside findings of fact only if they are "clearly erroneous," deferring to the trial court's superior opportunity "to judge the credibility of the witnesses." *Id.* "A judgment is clearly erroneous when there is no evidence supporting the findings or the findings fail to support the judgment," and will also be found clearly erroneous "when the trial court applies the wrong legal standard to properly found facts." *Id*.

[10] To the extent that statutory construction is implicated, our objective is to ascertain and give effect to the legislature's intent. *State v. Oddi-Smith*, 878 N.E.2d 1245, 1248 (Ind. 2008). The best evidence of that intent is the language of the statute itself, and we strive to give the words in a statute their plain and ordinary meaning. *Id.* A statute should be examined as a whole, and we should avoid excessive reliance upon a strict literal meaning or the selective reading of individual words. *Id.* The Court presumes that the legislature intended for the statutory language to be applied in a logical manner consistent with the statute's underlying policy and goals. *Id.*

Legal Framework for Grandparent Visitation Disputes

[11] Indiana Code Section 31-17-5-2(a) provides: "The court may grant visitation rights if the court determines that visitation rights are in the best interests of the child." In *In re M.L.B.*, our Indiana Supreme Court discussed the emergence of

grandparent visitation rights, which had not existed in the common law, and the framework applicable to disputed claims for visitation:

> Ultimately, in *Troxel v. Granville*, 530 U.S. 57, 120 S. Ct. 2054, 147 L.Ed.2d 49 (2000), the Supreme Court of the United States addressed the tension between those emerging rights and the fundamental right of fit parents to direct their children's upbringing. *Troxel* acknowledged that because "grandparents and other relatives undertake duties of a parental nature in many households," children's relationships with grandparents may deserve protection. 530 U.S. at 64, 120 S. Ct. 2054. 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.
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> In striking a balance between parental rights and children's interests, the *Troxel* plurality discussed several key principles, *see* 530 U.S. at 69–71, 120 S.Ct. 2054, which our Court of Appeals soon distilled into 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.
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> *McCune v. Frey*, 783 N.E.2d 752, 757–59 (Ind. Ct. App. 2003), citing *Crafton v. Gibson*, 752 N.E.2d 78, 96–98 (Ind. Ct. App. 2001). Subsequent Court of Appeals decisions followed suit. *E.g., In re Guardianship of J.E.M.*, 870 N.E.2d 517, 520 (Ind. Ct. App. 2007), and *In re Paternity of P.E.M.*, 818 N.E.2d 32, 37 (Ind. Ct. App. 2004).
>
> Then in *K.I.*, this Court approved of the four *McCune* factors, and took the additional step of declaring that a grandparent-visitation order "must address" those factors in its findings and conclusions. 903 N.E.2d at 462 (emphasis added). In connection with that requirement, we further explained 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*. (internal quotations and citations omitted).

983 N.E.2d 583, 586 (Ind. 2013).

Application of *McCune* Factors Herein

[12] The trial court's order recited the *McCune* factors but observed that they were derived from *Troxel*, which concerned fundamental Constitutional rights of parents. The trial court concluded that Guardians were not similarly situated to parents (albeit with recognition that the status would change if the adoption

petition were to be granted). Thus, the trial court entered no explicit finding on the degree of weight to be given to Guardians' wishes. The trial court made no explicit finding detailing the outcome or benefits of specific visits Guardians had allowed but found that Guardians had hindered Grandmother's development of a relationship with Child.[4] Ultimately, the trial court found that Guardians had not wholly restricted visitation and the remaining language focused primarily upon the factor of Child's best interests.

[13] Guardians contend that they are parents for purposes of a *McCune* analysis, and that the trial court was obliged to explicitly apply each factor. Grandmother responds that, while Guardians possess limited authority as conferred by statute, they are not parents with fundamental Constitutional rights, and the trial court appropriately considered all *McCune* factors but found some inapplicable because of that critical distinction.

[14] "[T]he interest of parents in the care, custody, and control of their children is perhaps the oldest of the fundamental liberty interests recognized by [the United States Supreme] Court." *Troxel,* 530 U.S. at 65. But the "constitutionally protected" parent-child relationship does not confer absolute rights upon a parent. *Id.* at 66. When necessary, State action may impact fundamental parental rights. For example, Indiana Code Section 29-3-5-3 requires the court ordering guardianship to first find "the appointment of a guardian is necessary

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[4] Although the trial court found that Guardians had "hindered" development of a relationship, specific acts amounting to hinderance were not detailed.

as a means of providing care and supervision of the physical person or property of the incapacitated person or minor." A guardianship is not a mechanism for preserving the rights of a guardian but is born of the necessity of intervention to provide for the essential needs of the protected person.

[15] Indiana Code Section 29-3-8-1 is entitled "Enumerated Responsibilities," and sets forth certain obligations of a guardian of a minor in subsection (a):

> The guardian of a minor (other than a temporary guardian) has all of the responsibilities and authority of a parent and, unless otherwise ordered by the court, is responsible for the preservation of all the minor's property regardless of where the property is located. In addition and without limitation, the guardian:
>
> (1) must be or shall become sufficiently acquainted with the minor and maintain sufficient contact with the minor to know of the minor's capabilities, disabilities, limitations, needs, opportunities, and physical and mental health;
>
> (2) shall, upon termination of the guardianship, comply with the applicable provisions of IC 29-3-12;
>
> (3) to the extent the available parental income and property are insufficient to fulfill the parental obligation of support to the minor, shall apply the guardianship income and, to the extent the guardianship income is insufficient, the principal of the guardianship property to the minor's current needs for support, and protect and conserve that portion of the minor's property that is in excess of the minor's current needs;
>
> (4) shall report the physical and mental condition of the minor to the court as ordered by the court; and

(5) has any other responsibilities that the court may order.

[16] Thus, Indiana Code Section 29-3-8-1 sets forth a non-exhaustive list of responsibilities of a guardian and provides that a court may order additional responsibilities to be assumed. Although responsibilities may approximate responsibilities of parents, parental status is not conferred. The statute permits guardianship over a minor's person and estate but does not purport to create parental rights and does not employ adoption language. By its terms, the foregoing statute contemplates an end to a guardianship.

[17] As a correlative, Indiana Code Section 29-3-8-2, entitled "Powers which guardian may exercise," enumerates certain powers conferred upon the guardian to exercise his or her responsibilities and includes the language: "If the minor has no living parent, other than a parent who is an incapacitated person, the powers granted to the parent of a minor under IC 29-3-3-3(1) through IC 29-3-3-3(8)."

[18] Guardians possess rights conferred by statute, subject to limitations imposed by the trial court. They are not Child's parents. That said, the question remains: are the *McCune* factors equally applicable to a non-parent guardian in a grandparent visitation dispute? Our review of *In re M.L.B.* and its progeny reveal that our Indiana Supreme Court has expressly approved the *McCune* framework and applied it in a parent-grandparent context, but no published Indiana case has explicitly applied the factors in a non-parent/grandparent context.

[19] *McCune* is grounded in *Troxel*, which factually presented concerns of parental rights of a Constitutional dimension. Guardians are not identically situated to parents, but there is similarity, in that Guardians possess some authority over Child. The trial court did not explicitly state that Guardians' wishes were being accorded great weight, but neither were their desires wholly disregarded. As a practical matter, Guardians' wishes were accorded some weight by the placement of the burden of proof upon Grandmother. *See In re M.L.B.*, 983 N.E.2d at 586 (recognizing that the burden of proof was placed on petitioning grandparents because of the presumption that a fit parent's decision is correct and that the "special weight" resulted in "establishing a heightened standard of proof by which a grandparent must rebut the presumption"). We understand the Supreme Court's discussion in *M.L.B.* to mean that some *McCune* factors are represented to some extent by the allocation of the burden of proof.

[20] Grandmother asserts that here the trial court applied the *McCune* factors to the extent practicable in a non-parent/grandparent visitation dispute. We disagree. Guardians are permanent guardians having authority largely akin to parental authority. The trial court awarded Grandmother visitation, including overnights. The generous award was against the wishes of Guardians and supported by cursory language to the effect that grandparent-child relationships are typically beneficial and Grandmother loves Child. In these circumstances, we remand for more particularized findings relative to this child and this particular relationship.

Sufficiency of the Evidence

[21] According to Guardians, Grandmother wholly failed to satisfy her burden of proof, such that reversal rather than remand would be warranted. As previously stated, Indiana Code Section 31-17-5-2(a) permits a trial court to grant visitation rights to a grandparent if the court determines that visitation is in the best interests of the child. Subsection (b) provides: "In determining the best interests of the child under this section, the court may consider whether a grandparent has had or has attempted to have meaningful contact with the child."[5] Guardians argue that Grandmother failed to satisfy her burden of proof and the lack of evidence is reflected in the trial court's findings and conclusions. In particular, Guardians point to the trial court's observation that there was a lack of evidence as to the "impact" upon Child from the visits that had occurred. Appealed Order at 6.

[22] In its order, the trial court acknowledged that Grandmother had the burden of proof to show that visitation is in Child's best interests. The trial court made factual findings detailing the lengthy history of contact and attempted contact between Child and Grandmother. The trial court found that contact had been less than "regular" but also found that Grandmother had "consistently" sought visitation, there had been "rising tensions between the parties," and Guardians had "hampered" the development of a relationship between Grandmother and

[5] Subsection (c) permits the trial court to conduct an in-camera interview with a child. This procedure was not requested here because Child is a toddler.

Child. Appealed Order at 3. The trial court acknowledged that Child was a toddler during the most recent visits and thus focused not upon specific positive outcomes from interactions but upon the general principle that fostering a grandparent-grandchild relationship is "typically beneficial." Appealed Order at 6. The court acknowledged that Maternal Grandmother had concerns about Grandmother but made no factual finding as to whether the concerns were well-founded.[6] The court also observed that, despite being given the opportunity for objections in prior guardianship proceedings, Father, Mother, and Guardians had not objected to Grandmother having contact with Child.

[23] The evidence most favorable to the trial court's order is that Grandmother lived with Child when Child was an infant, Child had significant contacts with Grandmother and other paternal relatives, Grandmother never abandoned her efforts to have a relationship with Child, and Grandmother loved Child. Guardians' insistence that the trial court should have focused upon actual visits that had taken place and their impact upon Child ignores the factual finding that they acted to thwart Grandmother's relationship with Child. At bottom, Guardians do not identify a lack of evidence but rather request that we reweigh

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[6] Specifically, the trial court found, in part: "The concern expressed by the Guardians to visitation was based upon concern that [Grandmother] was not following the Court's Order in relation to the Father . . . and that [Grandmother] still had not developed a relationship with [Child]. As to the former, it is of course important that Orders be followed. As to the latter, the restrictions imposed by the Guardians have hampered the development of a relationship." Appealed Order at 6. The trial court's finding that it is important that its orders be followed is not a sufficient finding. The quoted language stops short of finding whether a party or parties did, in fact, violate the court's order and moreover, the finding does not identify the specific "restrictions" to which the trial court referred in finding that the relationship had been "hampered" (which is, of course, something akin to "interference").

the evidence. We decline to do so. *See Best*, 941 N.E.2d at 502. That said, although the record is not devoid of evidentiary support for visitation, there is a lack of support for the breadth of the particular award.

Conclusion

[24] The trial court did not commit clear error by applying an incorrect legal standard. There is evidence of record to support the judgment that some grandparent visitation is in Child's best interests. However, the trial court failed to enter adequate factual findings as required by statute to support the specific terms of the visitation order and modifications therein, including the propriety of overnight visits, and that such visitation is in the best interests of Child; accordingly, we remand.

[25] Remanded.

Robb, J., and Tavitas, J., concur.