

MEMORANDUM DECISION

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IN THE Court of Appeals of Indiana

Jerry Bailey and Mary Bailey,
Appellants-Petitioners

v.

Erika Baker and Joshua Mesh,
Appellees-Respondents

June 28, 2024

Court of Appeals Case No.
23A-MI-2740

Appeal from the Madison Circuit Court
The Honorable Jason A. Childers, Magistrate
Trial Court Cause No.
48C01-2307-MI-228

Memorandum Decision by Judge Tavitas
Judges Mathias and Weissmann concur.

Tavitas, Judge.

Case Summary

- [1] Jerry and Mary Bailey (“the Baileys”) obtained an order granting them visitation with F.M., their granddaughter. F.M.’s parents, Erika Baker and Joshua Mesh (“the Parents”) subsequently married and moved to vacate the grandparent visitation order. The trial court granted this motion. The Baileys appeal and claim that the trial court erred by: (1) vacating the grandparent visitation order; and (2) failing to conduct an *in camera* interview of F.M. We disagree and, accordingly, affirm.

Issues

- [2] The Baileys present two issues for our review, which we restate as:
- I. Whether the trial court erred by vacating its earlier grandparent visitation order based on the Parents’ subsequent marriage.
 - II. Whether the trial court erred by failing to conduct an *in camera* interview of F.M.

Facts

- [3] Erika Baker and Joshua Mesh are the parents of F.M., who was born in 2017. Mary Bailey is Erika’s mother and F.M.’s maternal grandmother. Jerry Bailey is Erika’s stepfather but was considered to be F.M.’s grandfather. At one point in her life, F.M. consistently spent considerable time with the Baileys and often spent the night with them on the weekends. In April 2023, however, someone made a report to the Indiana Department of Child Services (“DCS”) regarding

F.M. Although no action was apparently taken after the subsequent DCS investigation, Erika believed that Mary was the person who made the report to DCS. Erika then stopped allowing the Baileys to see F.M.

[4] In July 2023, Mary went to Erika's house to persuade Erika to let her see F.M. again. The two argued, and Erika threatened to call the police. Mary attempted to prevent her from doing so. Mary claimed she merely put her hand on Erika's hand so they could talk, whereas Erika claimed that she and Mary struggled as Mary tried to take the phone away from Erika. Joshua ordered Mary to leave the house, took out his handgun, and cocked the handgun when Mary hesitated. Mary then left, and the Baileys continued to have no contact with F.M.

[5] On July 21, 2023, the Baileys filed a petition for grandparent visitation. On July 30, Erika filed a request for a protection order against Mary. The protection order case was then consolidated for hearing purposes with the grandparent visitation case, and the trial court held a hearing on both issues on October 4, 2023. Two days later, the trial court issued an order granting the visitation petition and ordered that Mary have overnight visitation with F.M. every other weekend. The trial court denied Erika's request for a protection order.

[6] On October 11, 2023, the Parents married. On October 23, 2023, the Parents filed a motion to vacate¹ the grandparent visitation order based upon their marriage. In their motion, the Parents relied on this Court’s opinion in *Campbell v. Eary*, 132 N.E.3d 413 (Ind. Ct. App. 2019). The Baileys filed a response to this motion on October 27, 2023, claiming that the Parents’ citation to *Campbell* was “out of context to the status of the law.” Appellant’s App. Vol. II p. 36. The trial court issued an order on November 1, 2023, that granted the Parents’ motion, thereby vacating the grandparent visitation order. The Baileys now appeal.

Discussion and Decision

I. The trial court did not err by vacating the grandparent visitation order based on the Parents’ subsequent marriage.

[7] The Baileys claim that the trial court abused its discretion by modifying the previously entered grandparent visitation order. The Parents argue that the trial court’s statutory authority to award grandparent visitation did not survive the marriage of the Parents. Thus, the question of whether the trial court properly vacated its earlier grandparent visitation order depends on the interpretation of the Grandparent Visitation Act, Indiana Code Chapter 31-17-5. We review issues of statutory construction de novo. *Kenworth of Indianapolis, Inc. v. Seventy-Seven Ltd.*, 134 N.E.3d 370, 376 (Ind. 2019).

¹ Although styled a motion to “dismiss” the grandparent visitation order, Appellant’s App. Vol. II p. 19, the motion effectively requested that the trial court vacate the grandparent visitation order.

[8] In *Campbell*, we summarized the law surrounding grandparent visitation as follows:

Historically, grandparents had no special common-law right to have visitation with a grandchild. However, by enacting the Grandparent Visitation Act, our General Assembly has recognized that a child's best interest is often served by developing and maintaining contact with his or her grandparents. The Act thus seeks to balance two competing interests: the rights of parents to raise their children as they see fit and the rights of grandparents to participate in the lives of their grandchildren.

The Act is in derogation of the common law and is the exclusive basis for a grandparent to seek visitation. As such, it must be strictly construed. The 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.

132 N.E.3d at 415 (citations and internal quotations omitted).

[9] The trial court granted the Bailey's visitation based on Section 1 of the Grandparent Visitation Act, which provides:

A child's grandparent may seek visitation rights if:

- (1) the child's parent is deceased;
- (2) the marriage of the child's parents has been dissolved in Indiana; or

(3) subject to subsection (b),^[2] the child was born out of wedlock.

Ind. Code § 31-17-5-1(a). Pursuant to Section 2 of the Act, the trial court may grant grandparent visitation under the following circumstances, specifically:

(a) The court may grant visitation rights if the court determines that visitation rights are in the best interests of the child.

(b) 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.

(c) The court may interview the child in chambers to assist the court in determining the child's perception of whether visitation by a grandparent is in the best interests of the child.

(d) The court may permit counsel to be present at the interview. If counsel is present:

(1) a record may be made of the interview; and

(2) the interview may be made part of the record for purposes of appeal.

[10] “Upon hearing evidence in support of and opposition to a petition filed under [the Grandparent Visitation Act], the court shall enter a decree setting forth the court's findings and conclusions.” Ind. Code § 31-17-5-6. “The court may

² Subsection (b) provides, “A court may not grant visitation rights to a paternal grandparent of a child who is born out of wedlock under subsection (a)(3) if the child's father has not established paternity in relation to the child.” I.C. § 31-17-5-1(b). Because the Baileys are maternal grandparents, this subsection is inapplicable.

modify an order granting or denying visitation rights whenever modification would serve the best interests of the child.” Ind. Code § 31-17-5-7.

[11] If a child is born out of wedlock, a grandparent’s visitation rights under the Act “survive the establishment of paternity of a child by a court proceeding other than an adoption proceeding.” Ind. Code § 31-17-5-8. Grandparent visitation rights also survive the adoption of the child by a stepparent, or any person biologically related to the child as: “(A) a grandparent; (B) a sibling; (C) an aunt; (D) an uncle; (E) a niece; or (F) a nephew.” Ind. Code § 31-17-5-9. “The Act does not speak to whether existing grandparent visitation orders survive the subsequent legitimation by marriage of a child born out of wedlock.” *Campbell*, 132 N.E.3d at 415.

[12] According to the plain language of the Act, grandparent visitation rights only survive in two situations: (1) the adoption of the child by stepparents or certain relatives; and (2) the establishment of paternity. Nothing in the Act provides that grandparent visitation rights survive the subsequent marriage of the parents of a child born out of wedlock. “Under the doctrine of *expressio unius est exclusio alterius*, when certain items or words are specified or enumerated in a statute then, by implication, other items or words not so specified or enumerated are excluded.” *A.A. v. Eskenazi Health/Midtown CMHC*, 97 N.E.3d 606, 614 (Ind. 2018) (quoted in *Campbell*, 132 N.E.3d at 416). This is especially true where, as here, the Act is in derogation of common law and must be strictly construed. We further note that a fit biological parent holds a privileged, and constitutionally protected, place with respect to his or her child. *J.I. v. J.H.*, 903

N.E.2d 453, 460-61 (Ind. 2009). For all of these reasons, we cannot say that the trial court clearly erred by concluding that the Baileys' grandparent visitation rights did not survive the marriage of the Parents.

[13] We reached the same conclusion in *Campbell*, where we held that grandparent visitation orders do not survive the later marriage of the child's parents. *Id.* at 416-17. In *Campbell*, the mother and father were not married at the time the child was born. The maternal grandmother sought grandparent visitation rights, which the trial court granted based on grounds that the child was born out of wedlock. *See id.* at 415 (citing I.C. § 35-17-5-1(a)(3)). Twenty-one months later, the parents married. The parents then moved to vacate the order on grounds that the visitation order did not survive the parents' marriage. The trial court denied the parents' motion. We reversed, concluding that the Act "does not provide for the survival of an existing grandparent visitation order when the biological parents legitimize their children by their subsequent marriage." *Id.* at 416-17 (emphasis added).

[14] The case before us is on all fours with *Campbell*. As in *Campbell*, F.M. was born out of wedlock, the maternal grandparents obtained a grandparent visitation order, and the parents subsequently married. As in *Campbell*, under such circumstances, grandparent visitation rights do not survive the marriage of the parents. To hold otherwise would require us to read language into the Grandparent Visitation Act that is simply not there. We do not necessarily agree with this harsh result of the Act, but our respect for the separation of powers and the distinct roles of the judiciary and the General Assembly require

that we strictly construe the language of the Act. Thus, the Baileys' policy arguments are better directed at the General Assembly, not this Court. Because the Baileys' grandparent visitation rights did not survive the marriage of the Parents, the trial court did not err by granting the Parents' motion to vacate the previously entered grandparent visitation order.

II. The trial court did not err by failing to conduct an *in camera* interview of the child.

[15] The Baileys also argue that the trial court erred by failing to conduct an *in camera* interview of F.M. Because grandparent visitation does not survive the marriage of the parents, an *in camera* interview was irrelevant to the trial court's required action to vacate the grandparent visitation order. Accordingly, the trial court did not err by failing to interview F.M. *in camera*.

Conclusion

[16] The trial court properly granted the Parents' motion to vacate the previously entered grandparent visitation order based on the Parents' subsequent marriage, and the trial court was not required to interview F.M. *in camera*. We, therefore, affirm the trial court's judgment.

[17] Affirmed.

Mathias, J, and Weissmann, J., concur.

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