

## MEMORANDUM DECISION

Pursuant to Ind. Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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## IN THE COURT OF APPEALS OF INDIANA

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Sarah Nicole Marshall,  
*Appellant-Respondent,*

v.

David Powers and Shelley  
Kilburn,  
*Appellees-Petitioners*

October 31, 2022

Court of Appeals Case No.  
22A-MI-1010

Appeal from the Morgan Superior  
Court

The Honorable Peter R. Foley,  
Judge

Trial Court Cause No.  
55D01-2105-MI-798

**May, Judge.**

[1] Sarah Nicole Marshall (“Mother”) appeals the trial court’s order granting grandparent visitation to David Powers<sup>1</sup> (“Grandfather”) and Shelley Kilburn (“Grandmother”) (collectively, “Grandparents”). Mother argues the trial court abused its discretion when it granted Grandparents’ petition for visitation with J.H. (“Child”) because the trial court’s findings do not support its conclusion that Grandparents are entitled to visitation with Child. We affirm in part, reverse in part, and remand.

## Facts and Procedural History

[2] Mother gave birth to Child on July 22, 2012. Mother and Child’s biological father, David Powers, a/k/a “Junior” (“Father”), never married. Father established paternity in 2015. Thus, Grandparents are Child’s paternal grandparents.

[3] Mother was in high school when Child was born, and she lived with Father and Grandparents for two months prior to Child’s birth. Mother moved out of Grandparents’ home after Child’s birth, but she moved back in with Grandparents after Child turned one. Mother lived with Grandparents until Mother and Father broke up “almost a year” later. (Tr. Vol. II at 24.) Father continued to live with Grandparents after Mother and Child moved out.

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<sup>1</sup> Although Grandfather uses the name “David Powers, Sr.” he testified that is not his legal name. (Tr. Vol. II at 54.) Instead, the family uses “Senior” and “Junior” to differentiate between the father and son, who both are named David Powers.

- [4] As part of the 2015 paternity order, Father was granted parenting time and extended visitation over the summer. Father exercised his parenting time at Grandparents' house, and Grandparents regularly cared for Child. Because of Father's ongoing substance abuse problems, Mother and Father agreed Father would exercise supervised parenting time. From that time on, Grandparents supervised Father's parenting time with Child.
- [5] In September 2018, during Father's supervised parenting time, Mother discovered Child playing outside unsupervised at Grandparents' house. The incident prompted Mother to seek restriction of Father's parenting time. The paternity court held a hearing on her request, and Father did not appear at the hearing. The paternity court restricted Father's parenting time to two-hour visits supervised by a third-party provider. Father has not seen Child since September 2018.
- [6] Since September 2018, Child has seen Grandparents "on only a handful of occasions." (App. Vol. II at 8.) Grandmother testified she last saw Child in 2019 when Mother brought Child and Mother's other two children to play with Father's extended family. Grandfather testified he last saw Child in "2020 at a McDonald's in Plainfield" and "[Child] barely recognized [him]." (Tr. Vol. II at 55-6.) In fall 2020, Child had surgery to treat a seizure disorder. Mother contacted Grandparents through Facebook Messenger to give them periodic updates on Child's surgery. Mother testified prior to that communication, Grandparents "were not calling, they were not messaging asking how he was, they were not asking to see him." (*Id.* at 89.) However, Mother also testified

she had blocked Grandparents from communicating with her via social media multiple times since 2018.

[7] Around 2020, Mother married Dominic Marshall (“Stepfather”). Mother and Stepfather have been in a relationship for approximately seven years. Mother and Stepfather have two children together. At some point prior to the case before us, Stepfather filed a petition to adopt Child.<sup>2</sup>

[8] On May 27, 2021, Grandparents filed a petition to establish grandparent visitation with Child.<sup>3</sup> Grandparents testified they filed the petition when they “found out that they were adopting and we would never be able to see [Child] again.” (*Id.* at 123.) The trial court held a final hearing on the petition on March 15, 2022. On April 22, 2022, the trial court entered its order granting Grandparents visitation with Child for “one (1) daytime only visit with [Child] each calendar month . . . on a Saturday in each calendar month as selected by Mother and shall begin at 10:00 a.m. and conclude at 7:00 p.m.” (App. Vol. II at 12-13.)

## Discussion and Decision

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<sup>2</sup> At the initial hearing, the trial court stated it felt “the best practice is to delay entering the Adoption Decree until the Court has entered an order on the grandparent rights.” (Tr. Vol. II at 5.)

<sup>3</sup> It would seem Father has contested Child’s adoption, though he did not participate in the proceedings regarding Grandparents’ petition for visitation with Child.

[9] As an initial matter, we note Grandparents did not file an appellees' brief. When an appellee does not submit a brief, we do not undertake the burden of developing arguments for that party. *Thurman v. Thurman*, 777 N.E.2d 41, 42 (Ind. Ct. App. 2002). Instead, we apply a less stringent standard of review and may reverse if the appellant establishes prima facie error. *Id.* Prima facie error is "error at first sight, on first appearance, or on the face of it." *Van Wieren v. Van Wieren*, 858 N.E.2d 216, 221 (Ind. Ct. App. 2006).

[10] Mother contends the trial court's findings do not support its conclusion to grant Grandparents visitation with Child. Indiana Code section 31-17-5 et. seq., also called the Grandparent Visitation Act, gives a trial court authority to grant grandparents visitation in certain circumstances if doing so is in the child's best interests. The trial court's decision regarding the child's best interests is left to the trial court's discretion and we will reverse only for an abuse of that discretion. *Swartz v. Swartz*, 720 N.E.2d 1219, 1221 (Ind. Ct. App. 1999). Although the amount of visitation is also left to the sound discretion of the trial court, "[t]he 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.'" *Hoeing v. Williams*, 880 N.E.2d 1217, 1221 (Ind. Ct. App. 2008) (quoting *Swartz*, 720 N.E.2d at 1221).

[11] The law regarding grandparent visitation is well-settled:

Although grandparents do not have the legal rights or obligations of parents and do not possess a constitutional liberty interest with

their grandchildren, nonetheless Indiana Code section 31-17-5-1, commonly referred to as the Grandparent Visitation Act, represents a Legislative recognition that “a child’s best interest is often served by developing and maintaining contact with his or her grandparents.” *Swartz v. Swartz*, 720 N.E.2d 1219, 1221 (Ind. Ct. App. 1999). Thus, in drafting the Act, the Legislature balanced two competing interests: “the rights of the parents to raise their children as they see fit and the rights of grandparents to participate in the lives of their grandchildren.” *Id.* at 1222.

*K.I. ex rel. J.I. v. J.H.*, 903 N.E.2d 453, 462 (Ind. 2009). Pursuant to Indiana Code section 31-17-5-1, paternal grandparents may seek visitation if a child was born out of wedlock, provided the child’s father has established paternity. The trial court may grant the grandparent visitation rights “if the court determines that visitation rights are in the best interests of the child.” Ind. Code § 31-17-5-2(a). In determining whether grandparent visitation is in a child’s best interests, “the court may consider whether a grandparent has had or has attempted to have meaningful contact with the child.” Ind. Code § 31-17-5-2(b).

[12] When determining whether to grant or deny grandparent visitation, the trial court must set forth findings of fact and conclusions of law. *K.I.*, 903 N.E.2d at 462. The trial court’s findings must address:

- 1) the presumption that a fit parent acts in his or her child’s best interests; (2) the special weight that must be given to a fit parent’s decision to deny or limit visitation; (3) whether the grandparent has established that visitation is in the child’s best interests; and (4) whether the parent has denied visitation or has simply limited visitation.

*Id.* When reviewing these findings and conclusions, we

first determine whether the evidence supports the findings, and then whether the findings support the judgment. 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. In turn, a judgment is clearly erroneous when the findings fail to support the judgment or when the trial court applies the wrong legal standard to properly found facts.

*K.L. v. E.H.*, 6 N.E.3d 1021, 1032 (Ind. Ct. App. 2014) (internal citations omitted). Mother does not challenge the trial court’s findings of fact, and thus they stand proven. *Madlem v. Arko*, 592 N.E.2d 686, 687 (Ind. 1992) (“Because Madlem does not challenge the findings of the trial court, they must be accepted as correct.”).

## 1. Grant of Visitation

[13] Here, in addition to the facts stated *supra*, the trial court found, in relevant part:

5. [Child] was diagnosed with autism at the age of 2 and has received therapeutic interventions. [Child] is now in third grade and doing well. Mother characterized [Child] as being particular about his schedule, needing ques [sic] for daily bathing and self-care, and struggling a bit socially.

\* \* \* \* \*

8. Since the September 2018 incident, the Grandparents have seen [Child] on only a handful of occasions. There is a discrepancy in the testimony about exactly when those visits occurred. [Grandfather] had a brief visit with [Child] at a

McDonald's, but it is clear that the Grandparents have not had any contact with [Child] over the last couple of years.

9. [Grandmother] has struggled with alcoholism. [Grandparents] were estranged for approximately three (3) months due to [Grandmother's] drinking, but reconciled. [Grandmother] has been sober since February 2020.

10. Father has been in and out of jail and appears to still be struggling with substance abuse issues. Father did not participate in these proceedings.

11. Mother has been married to [Stepfather] for approximately one (1) year but has been in a relationship with [Stepfather] for the past six (6) years. Mother and [Stepfather] have two (2) children together.

12. [Stepfather] has filed a step-parent adoption petition seeking to adopt [Child]. The adoption petition prompted the Grandparents to file this petition.

13. At various times since 2018 Mother has blocked the Grandparents from social media and messaging.

14. [Child] has a seizure disorder and in December 2020 underwent a surgery related to his seizure disorder. Mother reached out to Grandparents via social media messaging and updated them regarding [Child's] medical condition and the surgical procedure.

15. Mother realizes that the adoption, if granted, would terminate the Grandparents['] right to see [Child], but believes it is [in] the best interests of [Child] that his relationship with Grandparents be terminated. Mother believes that if the



adoption is granted and [Child] maintained a relationship with Grandparents, that [Child] would then know he had a biological father and “have questions.” Mother fears that this may result in anger and resentment from [Child] about “not having a father.” Mother also fears that [Child] would associate time with Grandparents as time with Father. Mother also has concerns that [Grandmother] may resume drinking.

16. Mother believes that Grandparents love [Child] and acknowledges that Grandparents provided care for [Child] over a number of years. Mother characterized Grandparents as having a “wonderful” relationship with [Child] when the child was younger, but that now [Child] doesn’t know Grandparents and doesn’t ask about them.

17. [Child] has had a relationship with Father’s sister and her child [K], who is [Child’s] cousin. [Grandfather] testified that [K] and [Child] used to spend the night together.

(App. Vol. II at 8-9.) Based thereon, the trial court concluded:

21. Mother is a fit parent. Therefore, this Court must presume that Mother’s decision to eliminate contact between [Child] and Grandparents is in the best interests of [Child].

22. Mother has indicated a desire to permanently deny any contact between [Child] and Grandparents. As a result, the very existence of the relationship between [Child] and Grandparents is at stake.

23. The Court must balance Mother’s decision to withhold or terminate [Child’s] relationship with Grandparents against the interests of [Child]. The Court does give weight to Mother’s fear that [Child] may have difficulty reconciling the abandonment of

Father if Grandparents maintain a presence in [Child's] life. However, the Court concludes that the benefits to [Child] of maintaining a relationship with Grandparents outweighs Mother's decision to terminate the relationship. [Child] benefited and was enriched by his relationship with Grandparents over the first six (6) years of his life. Grandparents provided significant care for [Child] and fostered [Child's] relationship with Father's extended family. The benefit of those relationships will be lost to [Child] if Grandparents' petition is not granted.

24. Other than Mother's concern regarding [Grandmother's] alcohol use, Mother's refusal to allow Grandparents to visit [Child] is unreasonable. [Grandmother's] prior alcohol problems do present a risk, but there is no evidence that [Grandmother] poses a current danger to the health, safety, or welfare of [Child]. The Court acknowledges that all recovering alcoholics, or persons suffering from a substance abuse disorders, pose a risk for relapse, but Mother has failed to offer any specific facts that [Grandmother] poses any greater risk of relapse.

25. Mother has acknowledged that Grandparents love [Child] and that Grandparents had a wonderful relationship with [Child]. Grandparents were a constant loving, nurturing, and positive presence in [Child's] life until Father's inability to maintain sobriety and continued drug use resulted in Mother discontinuing [Child's] relationship with Grandparents. It is understandable that Grandparents would not have pursued this petition, remaining hopeful of a reconciliation with [Child], until the adoption petition was filed and they were faced with a permanent estrangement from [Child].

26. Grandparents have overcome their burden and demonstrated that the benefits of a relationship between [Child] and Grandparents outweighs the Court's deference to Mother's decision to terminate [Child's] relationship with Grandparents.

27. Mother's fears as to [Child's] feelings of abandonment and the difficulty he may face due to Father's absence in his life are real and must be considered by the parties. Grandparents and Mother must be sensitive to those issues and foster an environment for [Child] to work through those issues in an appropriate manner.

28. Grandparent Visitation: The Court's order for grandparent visitation must reflect the lack of visits between Grandparents and [Child] over the last couple of years. Grandparents shall be entitled to one (1) day-time only visit with [Child] each calendar month. Unless the parties otherwise agree, the visits shall be on a Saturday in each calendar month as selected by Mother and shall begin at 10:00 a.m. and conclude at 7:00 p.m. Grandparents shall be responsible for all transports. Any other visits may occur as the parties may otherwise agree.

(*Id.* at 11-13) (emphasis in original).

[14] Mother argues the trial court's findings do not support Conclusion 23, which states:

23. The Court must balance Mother's decision to withhold or terminate [Child's] relationship with Grandparents against the interests of [Child]. The Court does give weight to Mother's fear that [Child] may have difficulty reconciling the abandonment of Father if Grandparents maintain a presence in [Child's] life. However, the Court concludes that the benefits to [Child] of maintaining a relationship with Grandparents outweighs Mother's decision to terminate the relationship. [Child] benefited and was enriched by his relationship with Grandparents over the first six (6) years of his life. Grandparents provided significant care for [Child] and fostered [Child's] relationship with Father's extended family. The benefit of those

relationships will be lost to [Child] if Grandparents' petition is not granted.

(App. Vol. II at 12.) She argues this conclusion conflicts with Finding 8, which states:

8. Since the September 2018 incident, the Grandparents have seen [Child] on only a handful of occasions. There is a discrepancy in the testimony about exactly when those visits occurred. [Grandfather] had a brief visit with [Child] at a McDonald's, but it is clear that the Grandparents have not had any contact with [Child] over the last couple of years.

(*Id.* at 8.) Mother contends Grandparents have not had a meaningful relationship with Child since September 2018 and therefore there is no relationship to maintain. Thus, she asserts, Grandparents have failed to rebut her position that a relationship between Child and Grandparents is not in Child's best interest.

[15] While Finding 8 may appear to conflict with the trial court's conclusion that it is in Child's best interests to maintain a relationship with Grandparents, other findings support that conclusion. Findings 6 and 7 indicate Grandparents were a significant part of Child's life from birth until approximately age six. While Finding 8 indicates Grandparents have had sporadic visitation with Child since September 2018, the trial court also noted in Finding 13 that Mother frustrated Grandparents' efforts to contact Child by blocking them on social media. Finding 14 states Mother contacted Grandparents in 2020 to report on Child's progress after surgery, which supports the continuation of a relationship

between Child and Grandparents. Finally, in Finding 16, the trial court found Mother recognizes Grandparents' love for Child and their past contribution to Child's life. Based thereon, we conclude the trial court's findings support conclusion 23's determination that maintaining a relationship with Grandparents is in Child's best interests. *See In re Visitation of L-A.D.W.*, 38 N.E.3d 993, 1001 (Ind. 2015) (despite father's more significant role in child's life following mother's death, the trial court did not abuse its discretion when it granted maternal grandparents visitation with child, as maternal grandparents had played an "extensive role" in child's life prior to mother's death).

## 2. Implementation of Visitation

[16] While we have concluded Mother did not demonstrate the trial court abused its discretion in ordering visitation between Grandparents and Child, we are concerned about the manner in which the trial court implemented visitation. The trial court concluded its order "must reflect the lack of visits between Grandparents and [Child] over the last couple of years." (App. Vol. II at 12.) However, the trial court then granted Grandparents "one (1) day-time visit with [Child] each calendar month. Unless the parties otherwise agree, the visits shall be on a Saturday in each calendar month as selected by Mother and shall begin at 10:00 a.m. and conclude at 7:00 p.m." (*Id.* at 12-3.) This immediate implementation of nine-hour blocks of visitation between Grandparents and Child is not supported by the trial court's findings.

[17] As the trial court found in Finding 5, "[Child] was diagnosed with autism at the age of 2 and has received therapeutic interventions. . . . Mother characterized

[Child] as *being particular about his schedule*, needing ques [sic] for daily bathing and self-care, *and struggling a bit socially.*” (*Id.* at 8) (emphases added).

Furthermore, the trial court found that since 2018 “the Grandparents have seen [Child] on only a handful of occasions” and “is it clear that the Grandparents have not had any contact with [Child] over the last couple of years.” (*Id.*) In fact, because of that absence from Child’s life, “[Child] doesn’t know Grandparents and doesn’t ask about them.” (*Id.* at 9.)

[18] Considering these special circumstances found by the trial court, we conclude ordering Child to begin spending nine-hour blocks of time with Grandparents was not in Child’s best interests. *See Swartz*, 720 N.E.2d at 1223 (trial court abused its discretion when it ordered a grandparent visitation schedule that was not in child’s best interests). The visits should have begun at a shorter length, possibly with Mother in attendance so that Child would feel more comfortable around people he does not recognize as relatives, until Child became familiar with Grandparents and more accustomed to alteration of his weekend routine. We accordingly reverse the trial court’s order for Child to spend nine-hour blocks of time with Grandparents and remand for the trial court to reconsider how best to implement visitation.<sup>4</sup> In addition, we note that after jurisdiction

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<sup>4</sup> We note that no stay appears to have been entered pending appeal, such that Child may already be spending nine-hour blocks with Grandparents on one Saturday each month. In the event Child has adjusted to Grandparents and to that schedule, the trial court should feel free to enter findings to support ordering Child to continue spending nine-hour blocks of time with Grandparents on one Saturday each month, keeping in mind that while “the Grandparent Visitation Act is silent on what the term ‘visitation’ means, the Act focuses on the child’s best interests.” *Spaulding v. Williams*, 793 N.E.2d 252, 263 (Ind. Ct. App. 2003).

has returned to the trial court, it will have continuing jurisdiction to modify the terms of visitation if appropriate.

## Conclusion

[19] Mother has not demonstrated the trial court abused its discretion when it granted Grandparents visitation of Child. However, we conclude the trial court abused its discretion when it ordered Grandparents immediately to have nine hours of visitation once a month without a phase-in period in light of Child's disability and lack of familiarity with Grandparents. Accordingly, we affirm in part, reverse in part, and remand for further proceedings consistent with this opinion.

[20] Affirmed in part, reversed in part, and remanded.

Crone, J., and Weissmann, J., concur.