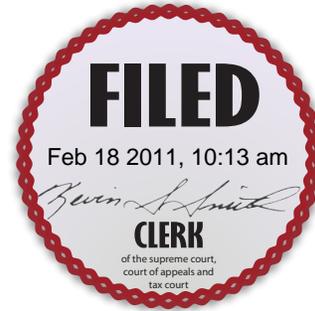


Pursuant to Ind.Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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**IN THE  
COURT OF APPEALS OF INDIANA**

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HOLLY ANN LEWIS (STAGGS), )  
 )  
Appellant-Petitioner, )  
 )  
vs. )  
 )  
GARY A. STAGGS, JR., )  
 )  
Appellee-Respondent, )  
 )  
DIANA NICHOLSON, )  
 )  
Intervenor. )

No. 53A01-1006-DR-316

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APPEAL FROM THE MONROE CIRCUIT COURT  
The Honorable Elizabeth Cure, Judge  
Cause No. 53C04-0803-DR-120

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February 18, 2011

**MEMORANDUM DECISION - NOT FOR PUBLICATION**

**FRIEDLANDER, Judge**

Holly Staggs Lewis (Mother) appeals from the trial court's order granting paternal grandmother, Diana Nicholson (Grandmother), visitation with Mother's minor son, B.S. Mother presents three issues for our review, one of which we find dispositive: Did the trial court err in granting Grandmother's motion to intervene in the dissolution action?

We reverse.

Mother and Gary Staggs (Father) married and one child, B.S., was born during the marriage. Mother also had an older son, B.R., from a prior relationship. On March 4, 2008, approximately two months before B.S. was born, Mother filed a petition for dissolution of marriage from Father. At the time of B.S.'s birth, Father was in jail. Father filed a cross-petition for dissolution of marriage on June 25, 2008. In the interim, Grandmother filed a Motion to Intervene and Request for Grandparent Visitation in the divorce action on May 27, 2008. The trial court held a hearing on all pending motions on June 27, 2008. Mother appeared pro se and Grandmother was present with counsel. At the conclusion of the hearing, the court entered an order summarily dissolving the marriage of Mother and Father. The court further noted that the child born during the marriage was presumed to be a child of the marriage. Because Mother believed another man may have been B.S.'s biological father, the court ordered genetic testing to establish paternity. The court took Grandmother's motion to intervene and request for visitation under advisement.

The court held a status hearing on August 27, 2008, at which time Mother admitted in open court that B.S. was Father's biological son. Because Father was still incarcerated, the court did not order any specific parenting time for Father. The court ordered, however, that Grandmother be permitted to "care for [B.S.] at such times as may be reasonable and proper."

*Appellant's Appendix* at 120. At that time, Grandmother provided care for B.S. twice a week (in the evenings) and on weekends, and eventually just on weekends, while Mother worked.<sup>1</sup>

In September 2008, Mother wrote a letter to the court expressing concerns about Grandmother's behavior and care for B.S. As a result of the letter, the court set a visitation review hearing for December 16, 2008. Grandmother requested a continuance of the review hearing. The trial court issued an order on December 8, 2008, granting Grandmother's request for a continuance and rescheduling the review hearing for February 5, 2009. In its order, the court, while noting that "no grandparent visitation petition was filed (or order issued) in strict compliance with IC 31-17-5," stated that "paternal grandmother intervened as a party early in the case." *Id.* at 122. The court ordered Mother and Grandmother to participate in mediation regarding "paternal grandmother having parenting time with child and whether a formal petition for grandparent visitation is warranted, appropriate, or opposed." *Id.*

Mother, pro se, and Grandmother participated in mediation and submitted their agreement to the court, which the court approved on January 20, 2009. Pursuant to the mediated agreement, Grandmother was to have visitation with B.S. one time per week for one and a half hours with the visit to occur in a public place of Mother's choosing and at a time convenient for Mother. They further agreed that B.S. would visit with Father on the second and fourth Sundays of every month with the possibility of an extended visit with

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<sup>1</sup> Grandmother also cared for B.R., her step-grandchild.

Father to take place on a regular Sunday visit. Additional visits could occur upon agreement of the parties.

Over the course of the next year, Mother and Grandmother cooperated with each other with regard to Grandmother's visitation time with B.S. For several months, Mother and Grandmother followed the terms of the mediation agreement by having Grandmother meet with B.S. for short periods of time at Kmart and Subway. Eventually, Mother began leaving B.S. (and also B.R.) with Grandmother for longer periods of time, including overnight on the weekends. In the fall of 2009, Mother frequently used Grandmother as a babysitter for both B.S. and B.R. In December 2009, Mother moved in with her boyfriend (now husband) and thereafter, B.S.'s time with Grandmother was significantly reduced.

On March 23, 2010, Grandmother filed a Verified Petition for Rule to Show Cause and for Modification of Visitation. In her petition, Grandmother requested that her visitation with B.S. be modified "so that she has parenting guideline visitation with [B.S.]" *Appellant's Appendix* at 131. In response to Grandmother's petition, Mother filed a letter with the court setting forth her concerns. The trial court held a hearing on Grandmother's petition on June 23, 2010. Mother appeared pro se and Grandmother appeared in person and by counsel. After Grandmother presented her evidence, Mother made the following statement on her own behalf:

All that I was going to say was I just want the best for [B.S.] I have no problem with [Grandmother] seeing him. I never have other than the issue we had in 2008 which we resolved. I would rather my son not stay the weekend anymore. He was being taken to the prison, which I didn't have a problem with until [Father] . . . had gotten in trouble for a scheduled controlled substance. I didn't know what it was but I didn't really want my son there. I just didn't think it was a safe place for him to be.

*Transcript* at 70. Mother presented no additional evidence. The court then proceeded to question Mother, expressing clear disapproval of Mother's explanation for the reduction in the amount of time B.S. was visiting Grandmother. At the conclusion of the hearing, the court directed the following statements to Mother:

THE COURT: . . . [Father] is [B.S.]'s father for better or worse you chose him. I didn't[,], no one else did and that's a fact that is not going to change. If, when he gets out of prison, in 2011, he does not stay clean and presents any sort of threat or danger or it's no longer in [B.S.]'s best interest that he have a relationship with him for whatever reason I will be the first person to step up. That will be no problem. But that's not where we are right now. Right now he has a father, uh, I'm not going to order you to tell him not to call Jason [Mother's new husband] dad but if you want to do what is in your son's best interest you won't encourage it. I'm going to allow him to go visit his father. I'm going to trust the Branchville Department of Corrections [sic] to monitor that. There is absolutely no evidence whatsoever that [B.S.] has been used for any vicarious purposes and that anything has happened as pictures with your wristband, your wrist in here and he's going for his father, I mean he has a relationship with him as well as he should. So I'm going to allow those visits to continue at the discretion of [Grandmother]. I'm going to grant the visitation every other weekend over night.

[MOTHER]: My son don't even know her anymore.

THE COURT: Sorry, that's not true. It's just what it is. You used her for a year as your babysitter. She had him every single weekend for three days at a time. You can't just remove a child from a person like that. There [sic] bonds that develop and if you think that child doesn't know you are wrong. You've tried your best. You've kept [Grandmother] from [B.S.] since February but he's going to get to see her and he is going to spend the weekend with her.

[MOTHER]: He's only two years old.

THE COURT: I know all this. She was fine to have him every other weekend when it was your convenience. You allowed her to do things for him and do things for you over and over and over again until there was an emotional bond that formed. It is in that child's best interest that bond continues. I can't order you to take [B.R.] but I think you will find that you are doing your children harm by keeping them from someone they've grown to love and know. I'm

going to grant every other weekend visitation from Friday at four to Sunday at four and one night during the week. . . .

\* \* \*

THE COURT: . . . You can not just create (inaudible) kids know, they know, and [B.S.] will know his grandmother when he sees her and he will know his father when he sees him again. And you will have them every other weekend. You can make whatever arrangements you guys agree on but she has a right to them every other weekend. I'm ordering you to appear with your son. . . .

*Id.* at 81-83. A discussion then ensued about the location where Mother and Grandmother would meet to exchange B.S. for scheduled visits and a convenient weekday for the weekly visits. During this discussion, Mother interjected and the following colloquy occurred:

[MOTHER]: . . . Is there any way we could do some type of (inaudible – crying) somebody because he's not use to be [sic] away from me for three days?

THE COURT: No, you are talking to me. I'm making this decision. Your, when he was a little baby and when he was much younger than he is now you left him for three days at a time with [Grandmother]. You didn't weep and you didn't have a bunch of transitions. You were going out with your friends. . . . It was convenient for you. And that's fine you are a young mother and believe me I was a young mother at times that had three, four kids at one point, uh, I understand wanting to have a social life as well. But you can't do that and know [sic] that suddenly he is going to be traumatized. The only person I think is going to be traumatized at all is you. And I think you're going to get use to it and you are going to be okay. But it's in your son's best interest having used [Grandmother] in this way and her having formed the kind of relationship that she has, it was not a casual relationship . . . You're going to be hurting [B.R.] if you don't take [B.R.] as well. He's going to wonder why he didn't get to go. Believe me and you know and it was in your son's best interest. Extended families are wonderful. And [Grandmother] seems to be a loving, caring, interested person. . . .

*Id.* at 81-87. On June 25, 2010, the trial court entered its order memorializing its decision.

The court's order provided as follows:

1. That although no formal Order granting [Grandmother]’s Motion to Intervene and Request for Grandparent Visitation, which was filed May 27, 2008 has been issued, prior rulings of this Court on October 7, 2008 and December 10, 2008 identify her as Intervenor and order her, as a party, to engage in mediation and her status as Intervenor should be formally ordered and acknowledged for the record.
2. That [Mother] and [Grandmother] previously agreed, in open Court on August 27, 2008 and subsequently through mediation on January 13, 2009, that the minor child, [B.S.]’s interests would be served by granting [Grandmother] grandparent visitation rights with [B.S.]
3. That [Grandmother]’s Verified Petition for Rule to Show Cause is granted as [Mother] has, without justifiable cause, violated this Court’s previous Order granting [Grandmother] grandparent visitation privileges with [B.S.], and she is in Contempt of Court for her violations of the Order.
4. That [Grandmother]’s Petition for Modification of Visitation should be granted as the Court finds, pursuant to I.C. 31-17-5-7 that a modification of the prior Orders granting grandparent visitation rights will serve the best interests of the child [B.S.].

*Appellant’s Appendix* at 8. Mother, by counsel, filed her notice of appeal on June 30, 2010.

Mother argues that the trial court erred when it granted Grandmother visitation with B.S. nearly coextensive to that provided for in the Parenting Time Guidelines for a non-custodial parent. Mother also argues that the trial court erred in permitting Grandmother to intervene when Grandmother did not follow the dictates of the Grandparent Visitation Act (the Act). *See* Ind. Code Ann. §§ 31-17-5 through -10 (West, Westlaw through 2010 2nd Regular Sess.). Finally, Mother argues that the trial court violated her right to due process when the court assumed an adversarial role rather than act as an impartial fact-finder. We need not address Mother’s first and third issues because we conclude that the trial court erred in allowing Grandmother to “intervene” in the divorce action.

In reaching our decision, we begin by noting that the Act is in derogation of common law and therefore must be strictly construed. *Dunson v. Dunson*, 769 N.E.2d 1120 (Ind. 2002). This court has before described the Act as follows:

As an initial matter, we note that 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.” However, grandparents “do not have the legal rights or obligations of parents,” and “do not possess a constitutional liberty interest in visitation with their grandchildren.” In [contrast], parents do have a “constitutionally recognized fundamental right to control the upbringing, education, and religious training of their children.” Furthermore, in “our traditions and collective conscience,” we have acknowledged that parents “have the right to raise their children as they see fit.” Therefore, when it drafted the Grandparent Visitation Act, our General Assembly had 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.” *McCune v. Frey*, 783 N.E.2d 752, 755-56 (Ind. Ct. App. 2003) (internal citations omitted).

*In re Guardianship of A.L.C.*, 902 N.E.2d 343, 355-56 (Ind. Ct. App. 2009).

I.C. § 31-17-5-3 (West, Westlaw through 2010 2nd Regular Sess.) provides that “[a] proceeding for grandparent’s visitation *must* be commenced by the filing of a petition entitled, ‘In Re the visitation of \_\_\_\_\_’” and further sets forth the contents of the petition. (Emphasis supplied.) The term “must” is mandatory language. *See Hammons v. Jenkins-Griffith*, 764 N.E.2d 303 (Ind. Ct. App. 2002). Here, Grandmother filed a motion to intervene, along with her request for grandparent visitation, in the divorce action. Grandmother’s motion to intervene did not comply with the requirements of the Act.

Grandmother does not assert any other basis that would permit her to intervene in the divorce action. To be sure, Grandmother does not have a right to intervene as there is no statute conferring upon her an unconditional right to intervene and she is not claiming an

interest relating to property, fund, or transaction that is the subject of the dissolution action. *See* Ind. Trial Rule 24(A) (intervention of right). Grandmother makes no claim that she is entitled to permissive intervention under T.R. 24(B).

Grandmother's response to Mother's argument that the trial court erred in allowing Grandmother to intervene is simply that Mother waived her right to contest Grandmother's intervention in the dissolution action. We cannot agree.

Grandmother filed her motion to intervene and request for visitation in the divorce action. Initially, the trial court took the matter under advisement pending a paternity determination. Upon Mother's admission that the biological father of B.S. was Grandmother's son, the court ordered that Grandmother be permitted to "care for [B.S.] at such times as may be reasonable and proper." *Appellant's Appendix* at 120. The court made no further rulings with respect to Grandmother's motion to intervene. The court's order is vague as it relates to Grandmother's status in the divorce hearing. When Mother contacted the court about her concerns relating to B.S.'s visitation with Grandmother, the court ordered the parties to participate in mediation and Mother complied with the court's order. At that time, the court acknowledged the fact that Grandmother had not filed a formal petition. The court only formally granted Grandmother's motion to intervene in its most recent order (dated June 25, 2010) when the court stated that Grandmother's status as an intervenor "should be formally ordered and acknowledged for the record." *Id.* at 8. The trial court made no finding as to what basis Grandmother was permitted to intervene in the divorce action.

Inasmuch as Grandmother's petition does not comply with the dictates of the Act and

there is no other basis for permitting Grandmother to intervene, the trial court erred in affording Grandmother status as a party in the divorce action. The trial court could not therefore entertain Grandmother's request for visitation. We therefore reverse the trial court's order awarding Grandmother visitation.

Although we have concluded that the trial court improperly granted Grandmother status in the divorce action as an intervenor, we feel compelled to make a few comments on the proceedings in this case.

We begin by noting that in its order granting or denying grandparent visitation, the trial court must set forth findings of fact and its conclusions of law with regard to (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. *In re Guardianship of A.L.C.*, 902 N.E.2d 343. We further note that, typically, the determination of whether granting grandparent visitation rights is in a child's best interests is a matter for the trial court's discretion, reversible only upon a showing of an abuse of that discretion. *Hoeing v. Williams*, 880 N.E.2d 1217, 1221 (Ind. Ct. App. 2008) (citation omitted). "An abuse of discretion exists where the trial court's decision is clearly against the logic and effects of the facts and circumstances before the trial court or the reasonable, probable deductions to be drawn therefrom." *Id.*

Here, in its order the trial court focused only upon the best interests of the child. While this is a paramount consideration, the trial court did not address the presumption that

Mother was a fit parent capable of acting and making decisions in her child's best interest. During the hearing, Mother informed the court that she had no problem with B.S. visiting with Grandmother, but Mother also explained that the visits would not be as extensive as they had previously been because she did not need Grandmother's services as a babysitter nearly as often. Mother also expressed her concerns about Grandmother taking B.S., a two-year-old, to visit Father in prison. Although Mother had agreed to allow visits with Father and had in fact attended visits to jail and prison, Mother changed her mind after Father was caught in possession of a controlled substance while incarcerated. Mother's change of heart, if you will, seems to be completely reasonable under the circumstances. The trial court discounted Mother's explanations and decisions regarding B.S. and found that such were trumped by what the court deemed to be in B.S.'s best interests, i.e., extensive visitation with Grandmother. As noted above, we recognize that a child's best interests are often best served by having a relationship with his or her grandparents. A court must not, however, lose sight of the parent's constitutional and statutory right to raise their child as they see fit.<sup>2</sup> A child's grandparent has no statutory authority to ask the court to limit a custodial parent's right in this regard. *See Hoening v. Williams*, 880 N.E.2d 1217.

We also note that the trial court's order for B.S.'s visitation with Grandmother is, contrary to Grandmother's argument on appeal, nearly equivalent to that provided for in the

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<sup>2</sup>Constitutional considerations aside, we note that our legislature has specifically granted custodial parents the authority to "determine the child's upbringing, including the child's education, health care, and religious training." Ind. Code Ann. § 31-17-2-17(a) (West, Westlaw through 2010 2nd Regular Sess.). Such authority may be limited "after motion by a noncustodial *parent*" only if the trial court finds that the child's "physical health would be endangered" or "emotional development would be significantly impaired." I.C. § 31-17-2-17(b) (emphasis added). Here, the trial court gave Grandmother the right to make decisions for B.S. contrary

Parenting Time Guidelines for a non-custodial parent. During the hearing, Grandmother expressly requested that she be granted visitation in accordance with the parenting time guidelines. Acknowledging the fundamental rights of parents to raise their children as they see fit, we have noted that “[v]isitation rights conferred by the Act are not a substantial infringement on the parent’s fundamental rights because the Act only contemplates occasional, temporary visitation as found to be in the best interest of the child.” *Id.* at 1221 (quoting *Swartz v. Swartz*, 720 N.E.2d 1219, 1222 (Ind. Ct. App. 1999)). We have repeatedly found that a trial court abuses its discretion in awarding visitation to grandparents to the extent provided for in the parenting time guidelines. *See In re Guardianship of A.L.C.*, 902 N.E.2d 343 (finding that trial court abused its discretion in awarding visitation to grandparents coextensive to that provided for in the parenting time guidelines); *Hoeing v. Williams*, 880 N.E.2d 1217 (finding prima facie error in trial court’s decision to grant a grandparent visitation rights nearly equivalent to those of a non-custodial parent). Our reversal is based on the fact that Grandmother did not follow the prescribed procedures under the Act and therefore does not have status as an intervenor in this divorce action. We note,

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to Mother’s wishes when it ordered that B.S. be permitted to visit with Father in prison “at the discretion of [Grandmother].” *Transcript* at 81.

however, that Mother presents a convincing argument that even if Grandmother followed the procedures necessary to attain such status under the Act, the trial court abused its discretion in awarding Grandmother such extensive visitation with B.S.

Judgment reversed.

MAY, J., and MATHIAS, J., concur.