

RECENT GUARDIANSHIP CASE ADDRESSES PRIORITIES IN APPOINTMENT AND GRANDPARENT VISITATION

The Indiana Court of Appeals recently issued a decision in the case of *In re the Guardianship of ALC*, 902 N.E.2d 343 (Ind. App. 2009). The decision does address two distinct elements of guardianship law. However, the ultimate lesson from the case is that the trial court has broad – but not unlimited – discretion in ruling on virtually all issues in the context of a guardianship.

The case arose in the context of a dispute among three sets of grandparents (and step-grandparents) over the guardianship for a young grandchild. As is often the case, the situation arose from bad facts, including substance abuse problems by young parents and the death of the infant child's mother. Ultimately, the trial court heard the evidence, and appointed one set of grandparents as guardians for the minor grandchild, and granted visitation rights to the other grandparents, consistent with Indiana's parenting time guidelines. All sides appealed.

The grandparents who were not appointed as guardians contended that the trial court abused its discretion by naming the other grandparents as guardians. The father of the minor child (who was battling his own demons and did not seek custody) had nominated his parents in writing. That set of grandparents contended that Indiana Code 29-3-5-5(a)(4) – which grants priority for appointment to any person who is nominated in writing by the parent of an incapacitated person – required the trial court to appoint them as guardians. The Court of Appeals held that, pursuant to the language of Indiana Code 29-3-5-5(a), the persons nominated by the parent were entitled to *consideration* as guardians; they were not entitled to be appointed as guardians. *ALC*, at 353-54. Ultimately, the trial court is vested with discretion to determine what is in the best interests of the alleged incapacitated person or minor. *Id.*

The Court's decision reflects a proper reading of Indiana Code 29-3-5-5. Often, parties and attorneys will refer to the priority statute as providing for entitlement to appointment. The statute, which is admittedly confusing with its reference to "priority", should be seen as a guide for the trial court's discretion, rather than a restriction upon it.

Interestingly, the Court of Appeals did act to limit the trial court's discretion when it came to the ruling on grandparent visitation. On that issue, the Court held that it was an abuse of discretion for the trial court to award a grandparent visitation consistent with the parenting time guidelines. *Id.*, at 356-57. The Court held that the Grandparent Visitation Act, Indiana Code 31-17-5, was the exclusive remedy by which a

grandparent could seek to have visitation rights with a grandchild. *Id.*, at 358. The Court also held that the Grandparent Visitation Act contemplated contact and visitation that was “occasional”, “temporary” and did not infringe upon the “parent’s” right to raise the child. *Id.* The Court reversed the trial court’s ruling on visitation and remanded on that point.

The Court’s ruling is significant in this sense: ordinarily, a grandparent visitation case involves balancing the rights of a parent with those of a grandparent; this case involved the balancing of rights of grandparents (who happened to be guardians) with those of other grandparents. The case is not a good fit with the Grandparent Visitation Act, unless the Court is saying implicitly that a guardian has the standing and rights as a parent, regardless of the nature of biological or filial relation.

Also left unanswered is the extent to which a trial court can properly exercise its discretion to find that visitation consistent with the parenting time guidelines, or something resembling the guidelines, does not infringe upon the parent/guardian’s right to raise the child who is the subject of the guardianship. Further cases, and perhaps the remand of this case, may be necessary to fully develop that point.