On **March 27, 2013**, the Indiana Court of Appeals issued a "for publication" opinion, *"**In Re: The Guardianship of A.J.A. and L.M.A.", minor children; J.C. v. J.B. and S.B.**"* Indiana Appellate Court Cause No. 49A02-1204-GU-326. The case is an appeal from an Order issued by the Honorable G. George Pancol, Madison Superior Court No. 2.

The opinion, authored by Judge Baker, can be found on the Court of Appeals website:

FACTS

Father, M.A., shot his wife and killed her. Two children from the parties' marriage, A.J.A. and L.M.A., were in the home at the time of Mother's death.

The same day, Father's **half**-brother, J.B., and his partner, S.B., took in A.J.A. and L.M.A. into their home. Father's half-brother and partner subsequently filed for, and obtained, guardianship over both children with the support of both families. Guardianship was granted on July 3, 2008.

Individual counseling for child A.J.A, later revealed she suffered from "Post-Traumatic Stress Disorder." On June 5, 2008, before the guardianship was granted, Paternal grandmother went to pick up A.J.A., from one counseling session, at the request of half-brother Paternal grandmother then took the child to the parking lot of the jail where father, M.A., was being held. Paternal Grandmother told the child that her Daddy was "...living there and that he was safe." Paternal Grandmother had the child get out of the car so father, M.A., could yell to her that "...he loved her." Once half-brother found out about this incident, he told Paternal Grandmother she could no longer see the children without supervised visitation.

On July 10, 2008 (7 days after the guardianship was granted), Paternal Grandmother, J.C., filed a Motion to Intervene in the Guardianship action and a Petition for Grandparent Visitation rights.

Paternal Grandmother's Motion to Intervene was granted over the objection of Father's half-brother and partner who had argued that Paternal Grandmother lacked standing since Paternal Grandmother was the mother of a **living** parent and the father and mother's marriage had never been dissolved by Court Order during mother's lifetime.

In August, 2008, all parties agreed to allow one hour of weekly "supervised" visitation for Grandmother for 6 weeks. The parties also agreed to begin family counseling through the Anderson Psychiatric Clinic, to "...try to facilitate future visitation." This provisional agreement was then issued by the Court as an Order.

The Court subsequently held four hearings, during February, April, and May, 2009, regarding Paternal Grandmother's petition for Grandparent Visitation Rights. On June 1, 2000, the trial court issued an Order granting Paternal Grandmother's petition following a "strict schedule" for her visitation.

Half-brother and partner then filed a Motion to Correct Error alleging the trial court had erred by granting the petition, and also erred by failing to issue specific findings of fact and conclusions of law as required by the guardianship statute. The trial subsequently issued specific findings and conclusions but did not disturb the remainder of the original order. Half-brother and partner did not appeal the revised Order.

In October, 2009, half-brother and partner filed a Petition to Adopt both children. The maternal aunt had also filed a petition to adopt the month prior. All parties agreed to transfer the guardianship case to Madison County Superior Court II for consolidated hearing with the adoption action. Paternal Grandmother then filed a "preemptive" Objection to Modification of Grandparent Visitation.

In July, 2011, a parenting coordinator was appointed by the Court to assist half-brother and partner in arranging visitation between the girls' maternal aunt, who had filed for adoption, as well as with the other grandparents. The parenting coordinator later reported that Paternal Grandmother had arranged for her son, M.A., the children's father, to talk, by phone, to one of the children without half-brother and partner's consent. The parenting coordinator recommended Paternal Grandmother's contact be "...supervised." At hearing, held January 19 2012, regarding the parenting coordinator's recommendations, the Court did NOT restrict Paternal Grandmother's contact, but, instead, admonished her on this issue.

On January 19, 2012, the same day as the hearing on the parenting coordinator's recommendations, half-brother and partner filed a petition to terminate Paternal Grandmother's visitation. Their argument was that Paternal Grandmother lacked "standing" under the Grandparent Visitation statute, therefore the Court lacked subject-matter jurisdiction to enter the original amended grandparent visitation order. Paternal Grandmother's response, filed February 28, 2012, argued that half-brother and partner had "waived" this argument by consenting to the provisional agreement and by failing to appeal the original amended grandparent visitation order.

On March 7, 2012, the trial court held a hearing on half-brother and partner's motion. The Order, issued on March 26, 2012, found that the original grandparent visitation order was "**void for lack of subject-matter jurisdiction**." The Order stated that the original trial court lacked authority to grant Paternal Grandmother visitation rights since Paternal Grandmother was not the parent of a deceased parent, and the parties' marriage had not been dissolved, by Court Order, at the time of mother's death. The trial court then vacated the original amended Order. Grandmother appealed this ruling by the trial court.

NOTE: at some point, the adoption petition filed by half-brother and partner was granted, though the Appellate Court opinion does not list the date when that occurred.

DISCUSSION AND DECISION

I. MOOTNESS. Half-brother and partner argued that since half-brother's partner is NOT biologically related to the children, the grant of the adoption petition terminated any grandparent visitation rights

previously exercised by Paternal Grandmother, therefore Paternal Grandmother's appeal is "moot." IC 31-17-5-9 states that grandparent visitation rights "survive" adoption of a child by a "stepparent" and certain other biological relatives including an uncle. In the Court of Appeals "de novo" review (de novo due to interpreting the statutory language of a law), the Court of Appeals found that this code section does NOT state that adoption by a non-relative terminates grandparent visitation rights. Instead, it provides situations were grandparent visitation rights survive. Adoption by a biological uncle is one such example. An uncle, whether a half-brother of the father, or a full brother, is still an "uncle" therefore the fact that half-brother's partner adopted the children is not dispositive. Paternal Grandmother's appeal is not moot.

II. GRANDMOTHER'S CLAIMS. Paternal Grandmother claimed: 1) she had standing to pursue grandparent's visitation rights since the parties' marriage was "dissolved" when father killed mother; and 2) even if paternal grandmother did not have standing, half-brother and partner "waived" their objections to her standing when they failed to appeal the original amended order.

The Court of Appeals found that Paternal Grandmother had "erroneously" been granted original standing since her child, the father, was still alive. Paternal Grandmother's argument that the marriage was "dissolved" when Father killed Mother failed. While the term "dissolved" is not defined in the Grandparent Visitation Act, the Court of Appeals stated "...in context, the term clearly refers to a marriage being terminated by a final dissolution decree. See Ind. Code. 31-9-2-41 (defining 'dissolution decree' as a 'judicial decree..." and Ind. Code 31-15-2-16(d)...(dissolution decree as decree that 'dissolves' the marriage)." Paternal Grandmother had no original standing to seek grandparent visitation under the Act.

Regarding Paternal Grandmother's second argument, subject-matter jurisdiction exists where a Court has jurisdiction over a general class of actions. *Troxel v. Troxel*, 737 N.E.2d 745, 749 (Ind. 2000). The Court also had personal jurisdiction over all parties by the pleadings filed in the guardianship case.

In *K.S. v. State*, 849 N.E. 2d 538, 540-41 (Ind. 2006), the Indiana Supreme Court found that "where subject-matter jurisdiction and personal jurisdiction exist, 'a court's decision may be set aside for legal error only through direct appeal and not through collateral attack.' Id. at 540."

However, in *M.S. v. C.S.*, 938 N.E.2d 278, 284 (Ind. Ct. App. 2010), the Indiana Court of Appeals held that a joint custody order between a parent and a third party was void due to the lack of statutory authority to issue such an order "...under any set of circumstances, and the error was therefore impossible to cure." *Id.*

Quoting from the instant opinion:

"[a]lthough *M.S.* was decided after *K.S.*, it failed to address any implications that *K.S.* might have had on its analysis and instead relied upon pre-*K.S.* reasoning from earlier opinions of the Court of Appeals. In light of the above-quoted language from *K.S.,* however, we decline to follow the paradigm for void and

voidable judgments as explained in *M.S.* **Accordingly, we conclude that although the initial grandparent visitation order may have been erroneous, the Guardians [half-brother and partner] nevertheless waived their objections to Grandmother's standing when they failed to appeal**." (emphasis added)

Finally, the Court of Appeals noted that since it has now been over a year since the original order was vacated to allow Paternal Grandmother grandparent visitation rights, "....it may be wise for the trial court to schedule a hearing *sua sponte* on the children's best interests to determine whether and to what extent grandparent visitation should occur in the future."'

HELD: Judgment of trial court REVERSED.

Judge Riley and Judge Barnes concur.