

**NOTICE**

This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

NO. 4-10-0853      Order Filed 3/25/11

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

In re: M.K., a Minor,	)	Appeal from
TONYIA ALLENDER,	)	Circuit Court of
Petitioner-Appellant,	)	McLean County
v.	)	No. 10F74
MICHAEL J. SMEDLEY,	)	
Respondent-Appellee.	)	Honorable
	)	Kevin P. Fitzgerald,
	)	Judge Presiding.

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JUSTICE STEIGMANN delivered the judgment of the court.  
Justices Appleton and Turner concurred in the judgment.

**ORDER**

*Held:*      The appellate court affirmed, concluding that the trial court's decision to deny grandmother's visitation petition was not against the manifest weight of the evidence.

In July 2009, petitioner, Tonyia Allender, filed an amended petition for grandparent visitation, seeking to force respondent, Michael J. Smedley, to allow her visitation as to Michael's daughter, M.K. (born August 7, 2003). Following two days of hearings in the fall of 2010, the trial court denied Tonyia's petition.

Tonyia appeals, arguing that the trial court's denial of her petition for grandparent visitation was against the manifest weight of the evidence. We disagree and affirm.

I. BACKGROUND

A. The First Years of M.K.'s Life

In August 2003, Slena Allender, a drug addict and purported prostitute, gave birth to M.K. Shortly thereafter, Nora Dalton, M.K.'s maternal great-grandmother, took M.K. into her home. Nora, with help from Tonyia--M.K.'s maternal grandmother--acted as M.K.'s primary caregiver for the next four years. During that time, the parties were unsure about the identity of M.K.'s biological father. In March 2008, the trial court, having determined that Michael was M.K.'s biological father, terminated Slena's parental rights and awarded Michael custody and guardianship of M.K.

B. Tonyia's Petition for Grandparent Visitation, M.K.'s Adoption, and the Trial Court's Hearing on That Petition

1. *Tonyia's Visitation Petition and M.K.'s Adoption*

In July 2009, Tonyia filed an amended petition for grandparent visitation, seeking a court order to force Michael to allow her visitation with M.K. "once a month from Friday at 6:00 p.m. until Sunday at 6:00 p.m. and one week of summer visitation."

In June 2010, Michael's wife, Leona Smedley, adopted M.K.

2. *The Hearing on Tonyia's Visitation Petition*

In September and October 2010, the trial court conducted hearings on Tonyia's visitation petition where it considered testimony from (1) Tonyia, Nora, Leona, and Michael, as well as (2) (a) Judy Osgood, a clinical psychologist, (b) Heather

Jones, the adoptive mother of two of M.K.'s maternal siblings (both of those children have different fathers), (c) Catherine Critz, Tonyia's friend, (d) Christopher Towman, Michael's stepson, and (e) Michael Risinger, M.K.'s guardian *ad litem*.

Tonyia testified that she had custody of three of her other grandchildren and that she had support from her mother--the children's great-grandmother--Nora. Tonyia explained that M.K. lived with Nora for the first four years of M.K.'s life and during that time, she and Nora worked to support M.K. and the other children and provided them a loving home. Tonyia further explained that after Michael's paternity was confirmed, she attempted to work with Michael to establish visitation, but her attempts were mostly rebuffed. Tonyia noted that she was seeking visitation, including overnight stays and one week in the summer.

Nora testified that M.K. lived with her for the first four years of M.K.'s life. During that time, Nora "did everything" with M.K., "teaching her how to do [things] just like [she] did [her] own kids." Nora changed M.K.'s diapers, bathed her, and fed her. Nora explained that M.K. stayed with Tonyia for at least a short period of time just about every day. Nora added that if granted visitation she and Tonyia would not "bring up the past."

Leona, a retired certified public accountant for State Farm Insurance Company, testified that she was married to Michael

and had adopted M.K. Leona explained that she felt that, at the time of the hearing, visitation with Tonyia and Nora would be "disruptive and confusing" to M.K. Leona also noted that her son, Christopher, had a daughter that was close in age to M.K.

When asked why she believed that it would be "damaging" to M.K. to have visitation with Tonyia and Nora, Leona testified as follows:

"We are trying to present [to M.K.] \*\*\* that we are her nuclear family, [Michael] and I. My family is her family. She understands that she is adopted. And when she is ready, I expect that she will come to us and ask questions. And if she wishes to make contact with her biological family, when she's old enough, when she asks directly, she will be allowed to do so[,] and we will answer her questions."

When questioned about whether M.K. had ever asked about Tonyia or Nora, Leona responded, "Never."

Michael testified that he (1) had lived in Bloomington, Illinois, most of his life, (2) had earned a college degree in mathematics, and (3) was a Marine Corps veteran of the Vietnam War. Michael described his relationship with M.K. as follows: "Very loving. It's one of the best things that ever happened in

my life. Very, very concerned about her welfare, and I'm concerned about everything she does." Michael explained that he believed that even though he had no doubt that Tonyia and Nora loved M.K., it was not in M.K.'s best interest to visit with Tonyia and Nora. Michael also noted that M.K. was doing very well in school and that he did not want to jeopardize the progress that he and Leona had made with M.K.

Michael also explained that he had a son, Todd Smedley, whose mother had died while giving birth to Todd. Michael said that Todd had earned his degree from Illinois State University and was working as a recreational therapist in Sacramento, California. Michael noted that Todd knew M.K. and treated her like a sister.

Michael further testified that his relationship with Leona had only strengthened since M.K. came into his life. When asked about whether he and Leona would consider visitation in the future, Michael responded as follows:

"Well, I know for a fact, absolutely for a fact that at some point down the line, [M.K.] will ask about the situation. She's a strong, independent, loving girl who \*\*\* loves the idea of siblings, likes the idea of having extended family. When she's old enough and she is asking the right questions

like ['C]an I go see them?' That will be our call.

\* \* \*

\*\*\* I'm not ruling out the possibility [of visitation], no. But I don't think it's going to be an intense involvement. I think that she should have \*\*\* everything settle down, [so that] everything is comfortable. Then it's quite likely that visitation would be on a supervised basis at the beginning. But right now, I think it's bad, bad timing.

\* \* \*

\*\*\* I do have the advantage and I'm not ruling [Tonyia and Nora] out of seeing [M.K.] \*\*\*. I've seen behavioral changes along the way. And I've sensed, like a father would, that the transition from [there] to Leona and I was a confusing time for her. She was very affectionate, very sensitive, confused. We diffuse that situation by answering certain questions. And in my opinion, it took a couple of years to get to the point where she feels like she's got a set of parents who are not going to leave, the police are not going

to be at the door, and we're going to give her all the attention and growth possibilities that she can handle."

Osgood, the clinical psychologist retained to evaluate Tonyia, Nora, and M.K., testified that M.K. had likely formed a strong, close bond with Tonyia and Nora and that it was clear that Tonyia and Nora had taken very good care of M.K. Osgood emphasized that the loving environment Tonyia and Nora provided M.K. in her early years of development helped M.K. to form secure, healthy attachments to them. Osgood opined that denial of visitation privileges would be harmful to M.K.:

"[I]t's denying [M.K.] \*\*\* some ongoing contact and communication with the two primary attachment figures of her life; the two people who essentially were in [the] role of a mother, who gave her the wonderful foundation that helped develop her into the child she is today. [T]hat can have some pretty significant [e]ffects throughout a child's life. But I think just the most immediate [thing is that] they love her. They \*\*\* have had her best interest \*\*\* in mind throughout her life. And \*\*\* I haven't had the chance to observe [M.K.] with them, but \*\*\* I'm sure

she has many memories and experiences, and it would help preserve those bonds for [M.K.]"

Osgood further opined that depriving Tonyia and Nora of visitation would deprive M.K. of a relationship with her biological sister who was being cared for by Tonyia and Nora. Osgood concluded that depriving Tonyia and Nora of visitation with M.K. could be "very damaging," potentially causing M.K. emotional harm. Osgood recommended visitation, supervised--at least initially--by a mental-health professional.

Jones, the adoptive mother of two of M.K.'s other maternal siblings, testified that M.K. lived with her in Peoria, Illinois, for two or three weeks before M.K. began staying with Michael. Jones explained that prior to M.K. coming into her home, the Department of Children and Family Services authorized sibling visitation for M.K. and that Tonyia and Nora brought M.K. to those visits. Jones added that she now meets Michael, Leona, and M.K. "at least \*\*\* once a month or every couple of months to get the kids together."

Critz, Tonyia's friend, testified that she had known Tonyia for 20 years and that she had observed Tonyia interact with M.K. "[n]umerous times." Critz explained that Tonyia was always with M.K. and that the two shared a mutual affection.

Christopher, Michael's stepson (Leona's son), testified that he was living in Chicago, Illinois, and was employed as a

chemist by the city of Chicago. Christopher explained that his daughter was approximately one year older than M.K. and that the two girls had a very good relationship.

Risinger, M.K.'s guardian *ad litem*, after having spent extensive time and effort (1) interviewing Tonyia, Nora, and M.K. and (2) talking to Osgood, filed his official report, recommending that the trial court deny Tonyia's visitation petition. In that regard, Risinger testified, in pertinent part, as follows:

"[M.K.'s] life has changed since the time she had associations with [the] people [she knew in her early life]. Her life has changed. And I don't think it's in her best interest to go back to that or have these visitations \*\*\* which I think, at this point, are going to be more confusing \*\*\* [b]ecause of the life that she now has, which now includes \*\*\* contact \*\*\* with [her siblings]. And she has this \*\*\* other life that \*\*\* is really going to continue to be her life."

C. The Trial Court's Decision To  
Deny Tonyia's Visitation Petition

In October 2010, the trial court denied Tonyia's petition, finding, in pertinent part, as follows:

"[*Flynn v. Henkel*, 227 Ill. 2d 176, 880 N.E.2d 166 (2007), says] that it's kind of

presumed that there's going to be some loss by not having the visitation. It's not enough to show that the denial deprives the child of the benefits, but that ultimately you have to show harm by virtue of the denial. And it's not enough to show that they're going to be deprived of a loving relationship. That's not the type of harm that the statute requires or the harm that can overcome the presumption of the parent's choice being in their best interest.

The evidence in this case that really went to harm was from \*\*\* Osgood. And her testimony that it was harmful to [M.K.] to deny the access to these attachment figures in her life and it would help preserve the bond established during her early years to allow the visitation. The [c]ourt never heard her specify what the harm would be. \*\*\* [W]hat [the court] see[s Osgood] saying is that \*\*\* it's not in [M.K.'s] best interest to disallow the visitation because she's going to miss out on having these loving relationships[,] that \*\*\* the original bond

[should be preserved], but that \*\*\* is present in almost every case involving grandparental visitation. [T]hat[,] in and of itself[,] is [not] enough to demonstrate the harm required by the statute. There was no testimony from [Osgood] that she felt that [M.K.] would be depressed; that she suffered from any depression; that she would develop psychological or psychiatric conditions; that she would have difficulty forming relationships. She never testified \*\*\* to any specific harm that would come or has come \*\*\* by virtue of the denial of the visitation.

[The court] would also suggest that even the general conclusion of best interest is somewhat rebutted by the fact that [M.K.] has only a faded memory of Nora and virtually no memory of Tonyia, met by \*\*\* Osgood's own testimony and her finding in her report and was supported today by Leona[,] indicating that [M.K.] has really never mentioned either one of them to her. [The court] think[s] it's also rebutted by the fact that [M.K. is]

thriving today in this environment, in this family. And if she were experiencing some harm by virtue of the denial of visitation, one would believe it may have manifested itself in some form at this point in time. And there's been no manifestation that the [c]ourt has heard anyway, of any harm that she has experienced or undergone as a result of a denial over the last several years.

\*\*\*.

[The c]ourt has considered all of the statutory factors [in] rendered[ing] its decision today. There are a host of them in paragraph 4(A) through (K) [(750 ILCS 5/607(a-5)(4)(A) through (a-5)(4)(K) (West 2008))]. Some would tend to favor visitation; others would tend to favor denial of visitation.

\*\*\*

Clearly, [the court] think[s] they clearly provided [M.K.] primary care for a substantial period of time; more than the statutory period of time. But, overall, the Court, even considering those factors, doesn't feel that [Tonyia and Nora] have been

able to show that the denial of the visitation has been harmful to [M.K.] to rebut the presumption that the parents are acting in \*\*\* her best interest. The Court has also considered the report of the Guardian *ad Litem*.

So, for all of those reasons, the Court is going to deny the petition for visitation."

This appeal followed.

## II. ANALYSIS

Tonya argues that the trial court erred by denying her petition for grandparent visitation because (1) its findings were contrary to the "intent and purpose of the statute" and (2) she demonstrated sufficient "harm" to rebut the statutory presumption. In short, Tonya contends that the court's denial of her petition for grandparent visitation was against the manifest weight of the evidence. We disagree.

### A. The Grandparent Visitation Statute

Section 607(a-5) of the Illinois Marriage and Dissolution of Marriage Act (750 ILCS 5/607(a-5) (West 2008)), commonly known as the grandparent-visitation statute, grants grandparents standing to petition for visitation but places the burden on those grandparents to show that the parent's decision

to deny visitation is harmful to the child:

"(a-5) (1) \*\*\* [A]ny grandparent \*\*\* may file a petition for visitation rights to a minor child if there is an unreasonable denial of visitation by a parent and \*\*\* the following condition[] exists:

\* \* \*

(D) the child is born out of wedlock, the parents are not living together, and the petitioner is a maternal grandparent \*\*\* of the child born out of wedlock.

\* \* \*

(3) In making a determination under this subsection \*\*\*, there is a rebuttable presumption that a fit parent's actions and decisions regarding grandparent \*\*\* visitation are not harmful to the child's mental, physical, or emotional health. The burden is on the party filing a petition under this [s]ection to prove that the parent's actions and decisions regarding visitation times are harmful to the child's mental, physical, or emotional health." 750

ILCS 5/607(a-5) (1) (D), (a-5) (3) (West 2008).

B. The Fit-Parent Presumption and the Standard of Review

"The presumption established in section 607(a-5) (3) that a fit parent's denial of a grandparent's visitation is not harmful to the child's mental, physical, or emotional health is the embodiment of the fundamental right of parents to make decisions concerning the care, custody, and control of their children which is protected by the fourteenth amendment." *Flynn*, 227 Ill. 2d at 181, 880 N.E.2d at 169. Thus, section 607(a-5) (3) places the burden on the grandparent to prove that the parent's decisions regarding visitation times are harmful to the child's mental, physical, or emotional health. *Flynn*, 227 Ill. 2d at 181, 880 N.E.2d at 169.

We will not disturb a trial court's determination that a grandparent has failed to overcome the section 607(a-5) (3) presumption unless that determination is contrary to the manifest weight of the evidence. *Flynn*, 227 Ill. 2d at 181, 880 N.E.2d at 169. A court's decision is contrary to the manifest weight of the evidence when the opposite conclusion is clearly evident or where the court's findings are unreasonable, arbitrary, and not based on any of the evidence. *Brynwood Co. v. Schweisberger*, 393 Ill. App. 3d 339, 351, 913 N.E.2d 150, 160 (2009).

C. The Trial Court's Decision To Deny  
Grandparent Visitation in This Case

In this case, Tonyia presented testimony, through Osgood, that denial of grandparent visitation would be "very damaging," potentially causing M.K. emotional harm. However, as the trial court explained when it rendered its judgment, Osgood never articulated what type of "damage" M.K. would suffer or the kind of emotional "harm" M.K. would have to endure if Tonyia were denied visitation, other than to point to the general grandparent-child relationship. As the supreme court concluded in *Flynn*, neither (1) denial of an opportunity for grandparent visitation nor (2) a child's never knowing a grandparent who loved her and who did not undermine the child's relationship with her parent, is "harm" that will rebut the presumption from the grandparent-visitation statute that a fit parent's denial of grandparent's visitation is not harmful to the child's mental, physical, or emotional health. *Flynn*, 227 Ill. 2d at 184, 880 N.E.2d at 171.

As previously outlined, Michael and Leona, M.K.'s parents, determined that although Tonyia clearly cared for and loved M.K., it was best for M.K. to be in a structured, nuclear family environment. Michael and Leona, tasked with raising M.K. with the backdrop of relative chaos and uncertainty, decided that incorporating M.K. into her extended family in small doses was the best prescription for whatever mental and emotional impact may have occurred as a result of her being moved from household

to household in her formative years.

Having evaluated this explanation and Tonyia's evidence related to the potential harm M.K. would endure, the trial court found that the decision to deny Tonyia visitation was not only not harmful to M.K., but a thoughtful and rational approach to a difficult situation. Given the unique facts of this case, we conclude that the court's finding in that regard was entirely reasonable. Put another way, we conclude that the court's decision to deny Tonyia's visitation petition was not against the manifest weight of the evidence.

In closing, we commend the trial court for its thoughtful explanation on the record of its reasons for denying Tonyia's petition for grandparent visitation. We also commend Michael and Leona for attempting to incorporate, to the extent they have deemed appropriate, Tonyia, Nora, and M.K.'s siblings into M.K.'s life, and encourage them to continue to do so in the future.

### III. CONCLUSION

For the reasons stated, we affirm the trial court's judgment.

Affirmed.