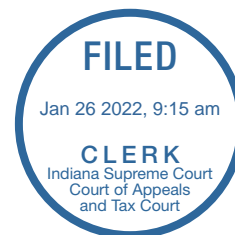


MEMORANDUM DECISION

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

A.W.,
Appellant-Respondent,

v.

L.S. and A.S.,
Appellee-Petitioners.

January 26, 2022

Court of Appeals Case No.
21A-AD-1641

Appeal from the Hamilton
Superior Court

The Honorable David K. Najjar,
Judge

Trial Court Cause Nos.
29D05-1908-AD-1180
29D05-1908-AD-1181

Bailey, Judge.

Case Summary

- [1] B.W. and R.W. (“Children”), born to A.W. (“Mother”), were adjudicated by a Marion County juvenile court to be Children in Need of Services (“CHINS”). Children remained in foster care for several years; the Marion County Department of Child Services (“the DCS”) petitioned to terminate Mother’s parental rights; the petition was denied. In Hamilton County, J.S. and A.S. (“Foster Parents”) petitioned to adopt Children absent parental consent from two of the three biological parents of Children. Mother filed a motion to contest the adoption. After a hearing, the Hamilton County Superior Court determined that Mother’s consent was not required and DCS had withheld its consent for a reason that was not in the best interests of Children. The court denied Mother’s motion to contest the adoption and certified its order as a final judgment, pursuant to Indiana Trial Rule 54(B).¹
- [2] Mother presents a sole issue for review: whether there is an insufficient evidentiary basis upon which to obviate parental and DCS consent to adoption. Although not articulating a separate issue in this regard, she suggests that the Hamilton Superior Court should have declined to act while CHINS

¹ In pertinent part, Trial Rule 54(B) provides: “When more than one [1] claim for relief is presented in an action, whether as a claim, counterclaim, cross-claim, or third-party claim, or when multiple parties are involved, the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment.”

proceedings, with a goal of reunification, were pending in Marion County. We affirm.

Facts and Procedural History

- [3] In 2015, when Mother was sixteen years old, she gave birth to B.W. One year later, Mother gave birth to R.W. Mother and Children were living with Children's maternal grandmother until 2017, when Children were removed and adjudicated CHINS due to the filthy and unsafe conditions of the residence. Children were initially placed with their maternal grandfather and step-grandmother, and Mother exercised supervised parenting time.
- [4] In May of 2019, Children were placed in the home of Foster Parents. Three months later, Foster Parents petitioned to adopt Children. In January of 2020, a petition for termination of Mother's parental rights was denied. On May 19, 2020, Foster Parents amended their petition for adoption and one month later, Mother filed her motion to contest the adoption.
- [5] The trial court conducted a hearing on February 26, 2021, and May 14, 2021. Foster Parents asserted that Mother's consent to adoption was not required because she had failed to provide support for Children when she was able to do so, and Foster Parents also claimed that Mother had sexually abused Children during her supervised visits. Mother testified that she had, for the most part, been employed while Children were in family placement and foster care, and she admitted that she had been able to support them but had paid nothing.

[6] As to allegations of sexual abuse, witnesses were diametrically opposed. Mother conceded that Children had reported sexual abuse, but Mother denied that she was the perpetrator. Foster Parents testified that the Children feared Mother and resisted visits, sometimes losing bladder control at the mention of a visit. Two therapists and a sex abuse behaviorist opined that Children had behaviors consistent with having experienced sexual trauma and testified that no person other than Mother had been identified as a perpetrator. On the other hand, visitation facilitators testified that they had supervised Mother's interactions with Children according to DCS protocol,² visits had generally gone well, and Children were willing participants. Mother's home-based therapist testified that she had observed some visits and that they had gone well. She opined that Mother had met all the goals of home-based therapy and had implemented appropriate skills.

[7] A DCS family case manager testified that the allegations of sexual abuse had not been substantiated; however, there was an open investigation. DCS took the position that the Children should remain in the custody of the Foster Parents, but DCS would not consent to the adoption while there was an existing CHINS plan for reunification.

² A visitation supervisor was required to stand by an open bathroom door if Mother was bathing the Children and required to stand outside a bathroom stall if Mother was taking a child for a bathroom break at a visitation center. On one occasion, a supervisor permitted Mother to take a child to the bathroom of Mother's mobile home while the supervisor sat at the kitchen table with a home-based services provider.

[8] On July 2, 2021, the trial court issued an order, accompanied by sua sponte findings of fact and conclusions of law. The trial court concluded that Mother’s consent was not required under Indiana Code Section 31-19-9-8 because of failure to support the Children and parental unfitness. The trial court also concluded that, “pursuant to IC 31-19-9-8(a)(10)[,] DCS has failed to consent to the adoption for reasons found by the court not to be in the best interests of the child[ren].” Appealed Order at 11.³ The trial court “denied the Motion to Contest the Adoption on the merits” and included the language: “Pursuant to Trial [Rule] 54(B), the Court finds that there is no just reason for delay and makes an express determination for the entry of judgment.” *Id.* at 12-13.

Discussion and Decision

[9] As a threshold matter, we address Mother’s suggestion that the Hamilton County Superior Court should have declined to act because “the CHINS cases and the adoption case are at odds with each other and do not have the same goals.” Appellant’s Brief at 12.

[10] In *Lake Cnty. Div. of Fam. & Child. Servs. v. T.B., (In re Adoption of T.B.)*, 622 N.E.2d 921, 923-24 (Ind. 1993), the Indiana Supreme Court held that the

³ Indiana Code Section 31-19-9-8(a)(2)(B) provides: “Consent to adoption ... is not required from any of the following: A parent of a child in the custody of another person if for a period of at least one year the parent: knowingly fails to provide for the care and support of the child when able to do so as required by law or judicial decree[.]” Pursuant to Indiana Code Section 31-19-9-8(a)(10), consent is not required from “[a] legal guardian or lawful custodian of the person to be adopted who has failed to consent to the adoption for reasons found by the court not to be in the best interests of the child.”

probate court had the authority to hear a petition to revoke an adoption and that the pending CHINS matter in the juvenile court did not divest the probate court of that authority. As the Court explained:

An action for adoption and a CHINS proceeding ... are separate actions which affect different rights. The CHINS proceeding is directed at helping the child directly by assuring that the child receives necessary assistance. Adoption, on the other hand, establishes a family unit. An adoption severs the child entirely from its own family tree and engrafts it upon that of another. As a result of the adoption, the adopted child becomes the legal child of the adoptive parent.

The legislature established the jurisdiction of juvenile courts and probate courts. The juvenile court was expressly given jurisdiction over CHINS proceedings and, similarly, a court with probate jurisdiction was expressly given jurisdiction over adoption matters. The power to adjudicate either matter does not divest the other court of its respective jurisdiction. Consequently, a court with probate jurisdiction may adjudicate an adoption matter simultaneously with the juvenile court's adjudication of a CHINS proceeding.

Id. at 924 (internal citations omitted). Consistent with this guidance, we proceed to the merits of Mother's appeal.

Standard of Review

[11] This Court will not disturb the ruling in an adoption proceeding unless the evidence leads to one conclusion and the trial court reached an opposite conclusion. *In re Adoption of D.M.*, 82 N.E.3d 354, 358 (Ind. Ct. App. 2017).

We recognize that the trial court is in the best position to judge the facts,

determine witness credibility, and assess family dynamics, and thus we presume that the trial court’s decision is correct. *In re Adoption of E.B.F. v. D.F.*, 93 N.E.3d 759, 762 (Ind. 2018.) The findings and judgment will be set aside only if they are clearly erroneous, that is, when there is no evidence supporting the findings or the findings fail to support the judgment. *Id.* We examine the evidence and reasonable inferences most favorable to the trial court’s decision and we will not reweigh the evidence. *Id.*

[12] Where, as here, the trial court enters findings of fact and conclusions thereon without an Indiana Trial Rule 52 written request from a party, the entry of findings and conclusions is considered to be sua sponte. *Dana Companies, LLC v. Chaffee Rentals*, 1 N.E.3d 738, 747 (Ind. Ct. App. 2013), *trans. denied*. Where the trial court enters specific findings sua sponte, the findings control our review and the judgment only as to the issues those specific findings cover. *Id.* Where there are no specific findings, a general judgment standard applies and we may affirm on any legal theory supported by the evidence adduced at trial. *Id.*

Mother’s Consent

[13] Indiana Code Section 31-19-9-8(a)(2)(B) provides that parental consent to adoption is not required from a “parent of a child in the custody of another person if for a period of at least one year the parent knowingly fails to provide for the care and support of the child when able to do so as required by law or judicial decree.” Mother points out that she was not subject to a court order for the support of Children. However, Indiana Code Section 31-19-9-8(a)(2)(B) is

written in the disjunctive, referencing either a legal duty or decree. Here, Mother conceded that she had a legal duty to support Children. *See In re Adoption of E.B.*, 163 N.E.3d 931, 937 (Ind. Ct. App. 2021) (observing that parents have a common law duty to support their children, which duty exists independently of any court order or statute).

[14] Mother also observes that dispensing with parental consent to adoption on grounds that the parent failed to provide support requires a showing that the parent had the ability to make payments. *See In re Adoption of K.S.*, 980 N.E.2d 385, 388 (Ind. Ct. App. 2012). The ability to pay depends upon such things as whether the income is regular or sporadic and the reasonable and necessary expenses of the parent during the period of time in question. *In re Adoption of Augustyniak*, 508 N.E.2d 1307, 1308 (Ind. Ct. App. 1987), *trans. denied*.

[15] Mother testified that, “for the most part,” she had been steadily employed after Children’s removal in 2017. (Tr. Vol. II, pg. 153.) At the time of the hearing, she was working 40 to 45 hours per week in a fast-food restaurant, together with her fiancé. Mother had given birth to a third child. She, her fiancé, and their child shared a trailer home; in the past, a relative had also resided there. There was no evidence elicited as to specific living costs or respective contributions. That said, however, Mother clearly testified that she had been able to provide support for Children:

Question: And at the time they were removed in March of 2017, you had the ability to earn an income, correct?

Mother: Yes.

Question: And you had the ability to pay support for these children, correct?

Mother: Yes.

Question: And your ability to earn a living and pay support continued through 2018?

Mother: Yes.

Question: In 2019 you had the ability to earn an income and support these children?

Mother: Yes.

Question: And in 2020 you've had ability to earn an income and provide support for these children?

Mother: Yes.

Question: And in the time, from the time the children were removed from your care in March of 2017 you've paid a total amount of zero dollars for support and care of these children, correct?

Mother: Yes.

(*Id.* at 157.) The evidence supports the trial court's finding that Mother knowingly failed to provide support for Children for a period of at least one

year when she was able to do so. The conclusion that Mother's consent to adoption is obviated on these grounds, pursuant to Indiana Code Section 31-19-9-8(a)(2)(B), is not erroneous. Thus, we need not address the additional grounds of unfitness in the context of parental consent.

DCS Consent

[16] Pursuant to Indiana Code Section 31-19-9-8(a)(10), consent to adoption is not required from: “[a] legal guardian or lawful custodian of the person to be adopted who has failed to consent to the adoption for reasons found by the court not to be in the best interests of the child.” Here, DCS neither filed a motion in opposition to Children's adoption by Foster Parents nor consented to the adoption. DCS Family case manager Rachel Gershin (“Gershin”) testified regarding this position. Gershin opined that Children were bonded with their foster family members and Children's best interests were served by remaining in the foster home, which she characterized as a “safe, happy, secure home.” (Tr. Vol. II, pg. 211.) Gershin additionally testified that Mother could not yet provide a safe home for Children. However, according to DCS policy, its consent to foster parent adoption would not be forthcoming while there was an active CHINS proceeding with a goal of parental reunification.

[17] The trial court found the withholding of consent by DCS to be contrary to Children's best interests, in light of the long-term CHINS placement, failure of appropriate parental response to DCS services, and the suitability of the prospective adoptive home. In particular, the trial court considered Mother's historical inability to provide appropriate housing and supervision, her

“complete lack of effort or interest to address sexual abuse issues,” and failure to provide any support. Appealed Order at 12. Children have been removed from the parental home for more than four years, in which time their interaction with Mother never progressed from supervised visitation. Meanwhile, Children thrived in their pre-adoptive placement, with foster siblings near their ages. There is evidentiary support for the trial court’s finding that DCS withheld consent to adoption based upon a reason not in Children’s best interests, that is, an internal DCS policy.

Conclusion

[18] The evidence does not point unerringly to a conclusion opposite that reached by the trial court. Accordingly, the order in this adoption matter will not be disturbed.

[19] Affirmed.

Mathias, J., and Altice, J., concur.