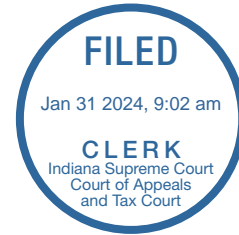


# MEMORANDUM DECISION

Pursuant to Ind. Appellate Rule 65(D), this Memorandum Decision is not binding precedent for any court and may be cited only for persuasive value or to establish res judicata, collateral estoppel, or the law of the case.



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## IN THE COURT OF APPEALS OF INDIANA

In the Matter of the Adoption of  
A.F. (Minor Child);  
D.H.,  
*Appellant-Respondent*

v.

T.W.,  
*Appellee-Petitioner.*

January 31, 2024

Court of Appeals Case No.  
23A-AD-1619

Appeal from the Lake Superior  
Court

The Honorable Thomas Stefaniak,  
Judge

The Honorable Timothy  
Haraminac, Referee

Trial Court Cause No.  
45D06-2211-AD-87

**Memorandum Decision by Judge Pyle**

Judges Tavitas and Foley concur.

**Pyle, Judge.**

## Statement of the Case

[1] D.H. (“Father”) appeals the trial court’s order that granted T.W.’s (“T.W.”) petition to adopt Father’s son, A.F. (“A.F.”). Father argues that the trial court erred in granting T.W.’s petition to adopt A.F. Father specifically contends that the trial court erred in finding that Father had failed to timely file a statutorily required motion to contest the adoption. Concluding that the trial court did not err in granting T.W.’s petition to adopt A.F., we affirm the trial court’s judgment.

[2] We affirm.

## Issue

Whether the trial court erred in granting T.W.’s petition to adopt A.F.

## Facts

[3] A.F. was born in August 2008. His parents are T.W. (“Mother”) and Father. Father established paternity of A.F. in December 2012. In August 2014, Father pleaded guilty to felony murder in Wisconsin and was sentenced to the Wisconsin Department of Corrections. In July 2017, Mother married T.W.

[4] Five years later, in November 2022, T.W. filed a petition to adopt A.F. The petition provided that Father had not consented to the adoption and that T.W. would send Father notice of the adoption proceedings. The petition further provided that Father had not had any “substantive contact with [A.F.] in nine

or ten (9-10) years[.]”<sup>1</sup> (Father’s App. Vol. 2 at 27). Also, in the petition, T.W. asked the trial court to schedule a hearing on the adoption petition. Further, T.W. attached to his petition Mother’s written consent to the adoption. The trial court scheduled an adoption hearing for January 9, 2023, at 8:30 a.m.

[5] On December 8, 2022, T.W.’s counsel (“T.W.’s Counsel”) mailed Father notice of the adoption proceedings. Specifically, T.W.’s Counsel sent Father a copy of the adoption petition as well as a copy of Mother’s consent to the adoption. T.W.’s counsel also sent Father a cover letter, which notified Father that the trial court had scheduled an adoption hearing for January 9, 2023, at 8:30 a.m. Further, T.W.’s counsel sent Father a Notice to Adoption, which provided, in relevant part, as follows:

If [Father] seeks to contest the adoption of [A.F.], he must file a motion to contest the adoption in accordance with I.C. 31-19-10-1 in the [Lake Superior Court] within thirty (30) days after the date of service of this Notice.

If [Father] does not file a motion to contest the adoption, within thirty (30) days after the date of service of this Notice, the [Lake Superior Court] will hear and determine the Petition for Adoption. The consent of [Father] will be irrevocably implied and he will lose the right to contest either the adoption or the validity of his implied consent.

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<sup>1</sup> In his appellate brief, Father claims that in 2019, the paternity court issued an order allowing him telephone contact with A.F. on Sunday evenings from 5:00 p.m. until 8:00 p.m. According to Father, Mother and T.W. did not accept any of Father’s telephone calls from the prison. However, these facts are not relevant to this appeal where the issue is whether Father timely filed a motion to contest the adoption.

No oral statement made to [Father] will relieve [Father] of his obligations under this Notice.

This Notice complies with I.C. 31-19-4.5-3 but does not exhaustively set forth a person's legal obligations under the Indiana adoption statutes. A person being served with this notice should consult the Indiana adoption statutes.

(T.W.'s App. Vol. 2 at 12). T.W.'s counsel addressed the documents to Father at the Sturtevant Transitional Facility, which is a Wisconsin Department of Corrections' facility. Although a prison official picked up the notice of the adoption proceedings from the post office on December 13, 2022, Father claims that he received the notice on January 3, 2023, when he was released from the facility.

[6] At the January 9, 2023, adoption hearing, the trial court ordered T.W.'s counsel to file proof that Father had received notice of the adoption proceedings and rescheduled the hearing for February 22, 2023. Father claims that he went to the courthouse on January 9, 2023, to attend the adoption hearing and to contest the adoption. Father further claims that a bailiff told him that the hearing had been rescheduled for February 22, 2023. Father did not file a written motion to contest the adoption.

[7] In February 2023, T.W.'s counsel filed a motion to continue the adoption hearing, which the trial court granted. The trial court rescheduled the hearing for March 22, 2023. Father claims that he went to the courthouse on February 22, 2023, to attend the rescheduled hearing and to contest the adoption. He further claims that a bailiff told him that the hearing had been rescheduled

again. Father still did not file a written motion to contest the adoption. Rather, he filed a handwritten notice of appearance by an unrepresented person in a juvenile case.

[8] The following month, on March 13, 2023, T.W.'s counsel filed a motion to continue the March 22, 2023, hearing. The trial court granted the motion and rescheduled the adoption hearing for April 26, 2023. On March 14, 2023, Father, represented by counsel ("Father's Counsel"), filed a petition to intervene in the adoption proceedings, which included an objection to the adoption. The trial court found that Father's petition to intervene was unnecessary because he was already a party to the adoption proceedings but noted that Father was contesting the adoption. Further, the trial court confirmed that the adoption hearing would be held on April 26, 2023.

[9] Two days before the adoption hearing, T.W.'s counsel filed an affidavit of service stating that Father had been served with notice of the adoption proceedings via certified mail on December 13, 2022, while he was incarcerated at the Sturtevant Transitional Facility. As proof of service, T.W.'s counsel attached the United States Postal Service ("USPS") certified mail receipt and a USPS tracking notice, which revealed that a prison official had picked up the notice of the adoption proceedings from the post office on December 13, 2022.

[10] The trial court held the adoption hearing as scheduled on April 26, 2023. When Father stated that he was contesting the adoption, T.W. argued that Father had been served with notice of the adoption proceedings on December

13, 2022, but had not filed a motion to contest the adoption until March 14, 2023, which was more than thirty days after Father had been served with the notice.

[11] Thereafter, the following colloquy ensued between the trial court and Father's Counsel:

Trial Court: Mr. Stigler, did you read the notification to your client?

Father's Counsel: Of?

Trial Court: Of the adoption, where it says "If [Father] does not file a motion to contest the adoption[] within thirty (30) days after the date of service of this Notice, the [Lake Superior] Court will hear and determine the Petition for Adoption."

Father's Counsel: We did not –

Trial Court: Basically, it means it's -- his consent is waived. He has 30 days from the date that he receives the notice to file his motion to contest, and he didn't.

Father's Counsel: Yes, that's -- well, Judge, we did not even see that particular – we can't see anything when – until my appearance is approved[.]

Trial Court: He has the responsibility, not you, Mr. Sigler. He does.

Father's Counsel: And it was definitely after 30 days.

Trial Court: Way after 30 days. So, technically, his consent is waived.

Father's Counsel: Yes, technically, Judge.

(Tr. Vol. 2 at 5).

[12] The trial court told Father’s Counsel that he could “file a motion . . . for [the trial court] to have a hearing on it[.]” (Tr. Vol. 2 at 5). Thereafter, the trial court told the parties that, at that time, it was finding that Father’s consent to the adoption had been waived and that it was going to schedule a final adoption hearing for June 14, 2023.

[13] On May 26, 2023, Father filed a motion asking the trial court to find that his March 2023 written objection to the adoption had been timely. In this motion, Father argued that although a prison official had received the notice of the adoption proceedings on December 13, 2022, Father had not received this notice until January 3, 2023, when he had been released from prison. According to Father, he had attempted to comply with the notice of the adoption proceedings “by appearing in person to voice his objection, on January 9, 2023, the date specified in the received documents.” (Father’s App. Vol. 2 at 39). Father further argued as follows:

16. Appearing before the Court on January 9, 2023, to voice his objection to the adoption proceedings would have occurred before the expiration of 30 days from the time that prison officials received the adoption proceedings mailing and from the time that those documents were provided to [Father].

17. The adoption proceedings documents received by [Father] on January 3, 2023, created confusion: He had to object to the adoption proceedings for [A.F.] within 30 days, but he also had to appear before the Court in 6 days, thereby making it reasonable to believe that appearing before the Court on January 9, 2023, would satisfy the notice and the scheduled hearing.

(Father’s App. Vol. 2 at 39).

[14] On June 5, 2023, T.W. filed a response to Father’s motion. In this response, T.W. argued that even assuming that Father had not received notice of the adoption proceedings until January 3, 2023, Father “still [had] failed to timely object to the adoption within the statutory time frame allowed under I.C. § 31-19-10-1(b). In fact, [Father’s] objection was not filed with this Court for 69 days.” (Father’s App. Vol. 2 at 44). That same day, the trial court issued an order denying Father’s motion. In its order, the trial court found that Father had failed to timely file a motion to contest the adoption in accordance with INDIANA CODE § 31-19-10-1(b). The trial court further found that because Father had failed to timely file this motion, Father’s consent to the adoption had been waived.

[15] The trial court held the adoption hearing as scheduled on June 14, 2023. Following the hearing, the trial court issued an order on adoption and an adoption decree. In these orders, the trial court found that Father had been served with notice of the adoption proceedings on January 3, 2023, and had not filed a motion to contest the adoption until March 14, 2023. The trial court further found that Father’s motion to contest the adoption had not been timely filed in accordance with INDIANA CODE § 31-19-10-1(b), which requires a person contesting an adoption to file a written motion to contest the adoption no later than thirty days after service of notice of the pending adoption. Because Father’s motion to contest the adoption had not been timely filed, the trial court further found that Father had waived his consent to the adoption.

[16] Father now appeals.



## Decision

[17] Father argues that the trial court erred in granting T.W.'s petition to adopt A.F. We disagree.

[18] In family law matters, we generally give considerable deference to the trial court's decision. *Matter of Adoption of E.M.M.*, 164 N.E.3d 779, 781 (Ind. Ct. App. 2021), *trans. denied*. Accordingly, when reviewing an adoption case, we presume that the trial court's decision is correct, and the appellant bears the burden of rebutting this presumption. *Id.*

[19] Further, we will not disturb the trial court's decision in an adoption proceeding unless the evidence at trial leads to but one conclusion and the trial court reached the opposite conclusion. *Id.* at 781-82. We will neither reweigh the evidence nor reassess the credibility of the witnesses. *Id.* at 782. In addition, we will examine only the evidence most favorable to the trial court's judgment. *Id.*

[20] The version of INDIANA CODE § 31-19-10-1 in effect at the time that T.W. filed his petition to adopt A.F. provided, in relevant part, as follows:

(b) A person contesting an adoption must file a motion to contest the adoption *in writing* with the court in which the petition for adoption is filed not later than thirty (30) days after

service of notice of the pending adoption. The motion must set forth the basis on which the person is contesting the adoption.<sup>[2]</sup>

(Emphasis added).

[21] In addition, the version of INDIANA CODE § 31-19-9-18 in effect at the time that T.W. filed his petition to adopt A.F. provided, in relevant part, as follows:

(b) The consent of a person who is served with notice under IC 31-19-4.5 to adoption is irrevocably implied without further court action if the person:

- (1) fails to file a motion to contest the adoption under IC 31-19-10 not later than thirty (30) days after service of notice under IC 31-19-4.5.<sup>[3]</sup>

[22] At the outset, we note that this Court has previously explained that the plain language of INDIANA CODE § 31-19-9-18 indicates that it is a nonclaim statute. *In re Adoption of K.M.*, 31 N.E.3d 533, 538 (Ind. Ct. App. 2015). Specifically, the language of the statute imposes a condition precedent to the enforcement of a right, i.e., the filing of a motion to contest an adoption petition. *Id.* If the condition precedent is not met, the right of action is lost and the adoption may not be challenged. *Id.* The legislative intent to take away a right of recovery is

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<sup>2</sup> Effective July 1, 2023, a person contesting an adoption must file a motion to contest the adoption in writing with the court in which the petition for adoption is filed not later than fifteen days after service of notice of the pending adoption.

<sup>3</sup> Effective July 1, 2023, the consent of a person who is served with the notice of an adoption is irrevocably implied without further court action if the person fails to file a motion to contest the adoption not later than fifteen days after service of notice.

clear from the language utilized. *Id.* Because INDIANA CODE § 31-19-9-18 is a nonclaim statute, a parent is not entitled to an equitable deviation from the thirty-day time limit and courts are not permitted to utilize equity to rectify an injustice even if warranted by the situation. *Id.* Moreover, INDIANA CODE § 31-19-9-19 provides that “[a] person whose consent to the adoption is irrevocably implied under [INDIANA CODE § 31-19-9-18] may not contest the adoption or the validity of the person’s implied consent to the adoption.”

[23] Father acknowledges that he received the notice of adoption that T.W. had mailed to the prison where Father had been incarcerated. Specifically, he acknowledges that he received the notice on January 3, 2023. Pursuant to the version of INDIANA CODE § 31-19-10-1 in effect at that time, Father was required to “file a motion to contest the adoption in writing . . . not later than thirty (30) days after service of notice of the pending adoption.” I.C. § 31-19-10-1(b). Father also acknowledges that he filed a written objection to the adoption on March 14, 2023, which is more than thirty days after January 3, 2023. Thus, under the relevant version of INDIANA CODE § 31-19-9-18, Father’s failure to file an objection within thirty days rendered his consent “irrevocably implied[.]” I.C. § 31-19-9-18(b).

[24] However, Father now attempts to contest the adoption and his implied consent to it by challenging the manner of notice he received. For the first time on appeal, Father argues that the notice he received was “defective” and that the irrevocably implied consent provision of INDIANA CODE § 31-19-9-18 “does not apply where there has been no compliance with the mandatory provisions of

Trial Rule 4.3 and Indiana Code § 31-19-2.5-6(b) regarding service upon imprisoned individuals.” (Father’s Br. 11, 12). Specifically, Father contends that when T.W. mailed the notice of adoption to Father at the prison, T.W. should have addressed the notice in the name of the prison official instead of Father’s name. However, Father has waived appellate review of this argument. *See McBride v. Monroe County Office of Family and Children*, 798 N.E.2d 185, 194 (Ind. Ct. App. 2003) (explaining that a party waives a claim that it raises for the first time on appeal).<sup>4</sup>

[25] In sum, Father received notice of the adoption proceedings on January 3, 2023 and did not file the statutorily required motion to contest the adoption until March 14, 2023, which is more than the thirty-day requirement set forth in the statute. Because Father’s motion to contest the adoption was not timely filed, Father’s consent to the adoption is irrevocably implied, and the trial court did not err in granting T.W.’s petition to adopt A.F.<sup>5</sup>

[26] Affirmed.

Tavitas, J., and Foley, J., concur.

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<sup>4</sup> Moreover, we note that the adoption statutes relating to a person entitled to notice of an adoption proceeding provide that the Indiana Trial Rules do not apply to the notice provision under chapter 4.5. *See* I.C. § 31-19-4.5-7.

<sup>5</sup> Father also argues for the first time on appeal that the trial court “violated[ his] due process rights by failing to ensure [T.W.]’s mandatory compliance with Trial Rule 4.3 and Indiana Code § 31-19-2.5-6(b) and concluding that [Father]’s consent to the adoption of [A.F.] was irrevocably implied by his failure to comply with the defective service of the notice of adoption.” (Father’s Br. 12-13). Father has also waived appellate review of this issue. *See McBride*, 798 N.E.2d at 194.