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IN THE COURT OF APPEALS OF INDIANA

B.A.,
Appellant-Respondent,

v.

D.D. and C.D.,
Appellees-Petitioners.

May 26, 2022

Court of Appeals Case No. 22A-AD-147

Appeal from the Hamilton Superior Court

The Honorable Michael A. Casati, Judge

Trial Court Cause No. 29D01-2103-AD-432

Najam, Judge.

Statement of the Case

[1] B.A. ("Father") appeals the trial court's grant of summary judgment in favor of D.D. and C.D. (collectively, "Adoptive Parents") on Adoptive Parents' claim that Father's consent to the adoption of P.A. ("Child") is not required. Father raises two issues for our review, which we revise and restate as follows:

1. Whether the trial court erred when it ordered Father to submit to a DNA test.

2. Whether the court erred when it granted summary judgment in favor of Adoptive Parents.

[2] We affirm in part, reverse in part, and remand for further proceedings.

Facts and Procedural History

[3] T.M. gave birth to Child on February 27, 2018.[1] According to Father, on March 12, he executed a paternity affidavit in which he identified himself as Child's father. *See* Appellant's App. Vol. 2 at 35. Thereafter, the Indiana Department of Child Services filed a petition alleging Child to be a Child in Need of Services and placed Child with Adoptive Parents.[2] Adoptive Parents have had physical custody of Child since April 7, 2019.

[4] On July 8, 2021, Adoptive Parents filed an amended petition to adopt Child. In their petition, Adoptive Parents acknowledged that Father is Child's "legal father" but alleged that his consent to the adoption is not required because he is

[1] T.M. is not a party to this appeal

[2] Father has filed a copy of the Child in Need of Services Petition in his appendix on appeal, but Adoptive Parents appear to contend that we cannot rely on any information contained in that petition because Father "improperly attached" it to his motion to correct error. Appellees' Br. at 12, n.5. Because we find that the petition does not contain any facts relevant to this appeal, we do not include information from the petition in this opinion.

not Child's "biological father." *Id*. at 146. Father filed his objection and motion to dismiss the petition. The trial court denied Father's motion.

[5] Adoptive Parents then filed a "Motion for Trial Rule 35 Order" that Father submit to DNA testing. *Id*. at 113 (emphasis removed). Adoptive Parents asserted that, if Father "is not the biological father of the [C]hild, his consent to [the] adoption will not be needed." *Id*. Father did not object. The court granted Adoptive Parents' motion and ordered Father to undergo DNA testing. The results of the DNA test demonstrated that Father is not Child's biological father. As a result, on September 29, Adoptive Parents filed a motion for summary judgment in which they asserted that, because Father is not Child's biological father, his consent to the adoption is "not required." *Id*. at 103. In support, they designated as evidence the notices of adoption and the results of the DNA test, but they did not designate their adoption petition. *See id*. at 105. On October 5, the court issued an order in which it stated that Father "shall have the period set forth in Ind. Trial Rule 56 to file any response." Appellees' App. Vol. 2 at 2.

[6] Father did not timely respond to Adoptive Parents' motion for summary judgment. On November 8, Father filed a motion for leave to file a response. In that motion, Father asserted that the court's October 5 order "was not issued to counsel for [Father] by the Odyssey e-filing system." Appellant's App. Vol. 2 at 65. Adoptive Parents objected and asserted that Father's "claim that he did not get the Court's Order of October 5 is of no moment" as "the Court's Order did not alter the time limits provided under" Indiana Trial Rule 56. *Id*. at 62.

[7] Father filed a response to Adoptive Parents' motion for summary judgment and asserted that he is Child's "legal father" because he had executed a paternity affidavit.[3] *Id*. at 55. Father also requested that the court set aside its prior order that he submit to DNA testing because, according to Father, "[o]nly a man who purports that he is the biological father of the minor child may seek to establish paternity, not prospective adoptive parents since Father's paternity is already established per the Paternity Affidavit." *Id*. at 56. In the alternative, Father contended that, even if the court did not set aside the order, the DNA test results "do not negate or set aside the parentage that was established in [Father] when he executed the paternity affidavit." *Id*. Father did not designate any evidence in support of his response. Father also filed a separate motion asking the court to set aside its prior order that he submit to DNA testing.

[8] Adoptive Parents filed a motion to strike Father's response to their motion for summary judgment because that response was "untimely." *Id*. at 49. Thereafter, the court denied Father's request for additional time, granted Adoptive Parents' motion to strike Father's response, and granted Adoptive Parents' motion for summary judgment. The court also denied Father's motion to set aside the order for DNA testing. Father then filed a motion to correct error and attached a copy of his paternity affidavit. The court denied his motion. This appeal ensued.

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[3] "A man is a child's legal father if the man executed a paternity affidavit" and "the paternity affidavit has not been rescinded or set aside[.]" Ind. Code § 31-14-7-3 (2021).

Discussion and Decision

Standard of Review

[9] Father appeals the trial court's denial of his motion to correct error. As this Court has previously explained:

> We review the grant or denial of a Trial Rule 59 motion to correct error under an abuse of discretion standard. On appeal, we will not find an abuse of discretion unless the trial court's decision is clearly against the logic and effect of the facts and circumstances before it or is contrary to law.

Spaulding v. Cook, 89 N.E. 3d 413, 420 (Ind. Ct. App. 2017) (internal citations omitted). Further, upon reviewing a motion to correct error, this Court also considers the standard of review for the underlying ruling. *Luxury Townhomes, LLC v. McKinley Properties, Inc.*, 992 N.E.2d 810, 815 (Ind. Ct. App. 2013).

Issue One: Order for DNA Testing

[10] Father first asserts that the court erred when it ordered him to submit to DNA testing. However, we note that Father did not object when Adoptive Parents filed their motion for DNA testing. The court then granted Adoptive Parents' motion and ordered Father to submit to a DNA test, an order with which Father complied. It was not until after Adoptive Parents had filed a motion for summary judgment and designated the results of the DNA test as evidence that Father first challenged Adoptive Parents' authority to request an order that he submit to the test.

[11] In addition, Father asserts that, under certain provisions of the Indiana Code, Adoptive Parents were unable to ask the court to order that he submit to a DNA test. However, Father disregards the fact that Adoptive Parents filed their motion for DNA testing pursuant to Indiana Trial Rule 35, which allows a court to order a party "to submit to a physical or mental examination" when "the mental or physical condition (including the blood group) of a party . . . is in controversy." Ind. Trial Rule 35(A). Father does not cite Trial Rule 35, nor does he make any argument to explain either why that rule does not apply or why the court erred when it granted Adoptive Parents' motion under that rule. As such, Father has not met his burden on appeal to demonstrate that the court erred when it ordered him to submit to DNA testing.

Issue Two: Summary Judgment

[12] Father next asserts that, even if the court did not err when it ordered him to submit to DNA testing, the court nonetheless erred when it entered summary judgment in favor of Adoptive Parents on their claim that Father's consent to the adoption is not required. Our standard of review for summary judgment appeals is well settled. The Indiana Supreme Court has explained that

> [w]e review summary judgment de novo, applying the same standard as the trial court: "Drawing all reasonable inferences in favor of . . . the non-moving parties, summary judgment is appropriate 'if the designated evidentiary matter shows that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.'" *Williams v. Tharp*, 914 N.E.2d 756, 761 (Ind. 2009) (quoting T.R. 56(C)). "A fact is 'material' if its resolution would affect the outcome of the case, and an issue is 'genuine' if a trier of fact is required to

> resolve the parties' differing accounts of the truth, or if the undisputed material facts support conflicting reasonable inferences." *Id*. (internal citations omitted).
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> The initial burden is on the summary-judgment movant to "demonstrate [ ] the absence of any genuine issue of fact as to a determinative issue," at which point the burden shifts to the non-movant to "come forward with contrary evidence" showing an issue for the trier of fact. *Id*. at 761-62 (internal quotation marks and substitution omitted). And "[a]lthough the non-moving party has the burden on appeal of persuading us that the grant of summary judgment was erroneous, we carefully assess the trial court's decision to ensure that he was not improperly denied his day in court." *McSwane v. Bloomington Hosp. & Healthcare Sys*., 916 N.E.2d 906, 909-10 (Ind. 2009) (internal quotation marks omitted).

Hughley v. State, 15 N.E.3d 1000, 1003 (Ind. 2014) (omission and some alterations original to *Hughley*).

[13] We first address Father's brief assertion that his attorney "was not added to the electronic e-file system and therefore did not receive notice of the order on the Motion for Summary Judgment." Appellant's Br. at 11. To the extent that is an argument by Father that the court erred when it struck his untimely response because he did not receive the court's October 5, 2021, order, we cannot agree. That order simply stated that Father "shall have the period set forth" in Trial Rule 56(C) to file his response. Appellee's App. Vol. 2 at 2. While Father's attorney did not receive that order, there is no dispute that Father received a copy of the motion for summary judgment. And Father does not explain how the failure to receive an order that simply confirmed the time limit provided in

the Trial Rules prevented him from being able to timely respond to Adoptive Parents' motion. The court did not err when it struck Father's untimely response. That said, a court is not required to grant an uncontested motion for summary judgment. *See Murphy v. Curtis*, 930 N.E.2d 1228, 1233 (Ind. Ct. App. 2010). Thus, Father's failure to timely respond does not entitle Adoptive Parents to summary judgment. Rather, summary judgment is awarded only "if appropriate" based on the designated evidence. *See* Ind. Trial Rule 56(C). We therefore address Father's argument that the court erred when it granted Adoptive Parents' motion for summary judgment.

[14] Father contends that the court erred when it entered summary judgment in favor of Adoptive Parents on the ground that Father's consent to the adoption is not required. It is well settled that a petition to adopt a child may be granted only if written consent to the adoption has been executed by certain individuals. *See* Ind. Code § 31-19-9-1(a) (2021). As relevant here, a petition to adopt a child may only be granted if written consent has been executed by the "mother of a child born out of wedlock and the father of a child whose paternity has been established" by "a court proceeding other than the adoption proceeding" or "a paternity affidavit executed under IC 16-37-2-2.1." I.C. § 31-19-9-1(a)(2).

[15] We note that, on appeal, the parties dispute whether the alleged paternity affidavit executed by Father meant that his consent to the adoption is required under the adoption statute. However, at the time the court ruled on Adoptive Parents' motion for summary judgment, the court did not have any evidence before it that Father had executed a paternity affidavit. It was not until Father

filed his response to Adoptive Parents' motion for summary judgment that he first identified himself as Child's "legal father" and asserted that he had executed a paternity affidavit. Appellant's App. Vol. 2 at 55. But as discussed above, the court properly struck Father's response as untimely.[4] As a result, the only properly designated evidence before the court included the notices of adoption and the results of the DNA test that excluded Father as Child's biological father.

[16] As discussed above, summary judgment shall be rendered only if the designated evidentiary matter shows that there is no genuine issue of material fact and that Adoptive Parents were entitled to judgment as a matter of law. On appeal, Adoptive Parents contend that, because the designated evidence reveals that Father is not Child's biological father, they have met their burden as summary-judgment movants to demonstrate that no genuine issue of material fact exists and that Father's consent is not required. We cannot agree.

[17] Again, consent to an adoption is required for a child born out of wedlock by a father who has established his paternity either through a court proceeding or a paternity affidavit. I.C. § 31-19-9-1(a)(2). Therefore, in order to be entitled to summary judgment on the ground that Father's consent is not required,

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[4] Even if the court had not struck Father's response as untimely, Father did not designate a paternity affidavit, or any other evidence, to support his assertion that he was Child's legal father. The first time Father provided the court with a copy of the alleged paternity affidavit was as an attachment to his motion to correct error. Father did not make any argument to the trial court, and he does not explain on appeal, why he was unable to provide that document to the court prior to his motion to correct error.

Adoptive Parents were required to designate evidence that Father has not established his paternity. But Adoptive Parents did not designate any such evidence.

[18] Adoptive Parents assert that Father's exclusion as Child's biological father, without more, demonstrates that Father's consent is not required, regardless of whether he has executed a paternity affidavit. In essence, Adoptive Parents contend that a paternity affidavit can be nullified simply by proof that the affiant is not the biological father. However, a man's execution of a paternity affidavit "establishes paternity" and "gives rise to parental rights and responsibilities," including the right of the child's mother to obtain child support and the right of the man to have parenting time. I.C. § 16-37-2-2.1(j). And except as otherwise provided, "if a man has executed a paternity affidavit in accordance with this section, the executed paternity affidavit conclusively establishes the man as the legal father of a child without any further proceedings by a court." I.C. § 16-37-2-2.1(p). It is clear that, if a man executes a paternity affidavit and does not rescind it, he is by all accounts the father of the child. As such, we cannot agree with Adoptive Parents that the exclusion of a father as the biological father necessarily means that his consent is not required. Rather, the plain language of Indiana Code Section 31-19-9-1(a)(2) requires consent from a man whose paternity has been established through the execution of a paternity affidavit, subject to other provisions of the Indiana Code that may apply, including the best interests of the child. *See* I.C. § 31-19-11-1(a) (allowing the court to grant an adoption petition if, among others,

the court finds that the adoption is in the best interests of the child), *see also* I.C. § 31-19-9-8 (enumerating circumstances when consent to an adoption is not required).

[19] Still, Adoptive Parents contend that the reference in Indiana Code Section 31-19-9-1(a)(2) to a father whose paternity has been established "means the *biological* father" such that only biological fathers can contest an adoption. Appellees' Br. at 26 (emphasis in original). Adoptive Parents' interpretation would require that we add words to the statute that are not there. But it is well settled that we may not add new words to a statute which are not the expressed intent of the legislature. *Bergman v. Big Cicero Creek Joint Drainage Bd.*, 137 N.E.3d 955, 963 (Ind. Ct. App. 2019). Had the legislature intended that only biological fathers who have established their paternity through a paternity affidavit are required to give their consent, it would have said so. But the legislature did not, and we cannot read that limitation into the statute. In other words, whether or not Father is Child's biological father does not, in itself, determine whether Father's consent is required.

[20] In addition, Adoptive Parents assert that Father is a not a "parent" under the adoption statute. *See* Appellees' Br. at 27. Adoptive Parents are correct that a "parent" for purposes of the adoption statute is defined as "a biological or an adoptive parent." I.C. § 31-9-2-88(a). However, while the legislature used the word "parent" in other parts of Indiana Code Section 31-19-9-1, it did not use that word in the relevant subsection. Indiana Code Section 31-19-9-1(a)(2) requires the consent of the "mother of a child born out of wedlock and the

father of a child whose paternity has been established" by a court proceeding or a paternity affidavit. Again, had the legislature intended that only a "parent" of a child born out of wedlock be required to consent to an adoption, it would have said so. We therefore hold that Indiana Code Section 31-19-9-1(a)(2) requires the consent of any man who has established his paternity in one of the two methods before an adoption can occur, including through the execution of a paternity affidavit.

[21] The designated evidence demonstrates that Father is not Child's biological father. However, as the summary-judgment movants, it was Adoptive Parents' initial burden to designate evidence that would, if proven, exclude Father as Child's legal father such that his consent was not required under Indiana Code Section 31-19-9-1(a)(2). Had they done so, the burden would have shifted to Father to designate evidence that a genuine issue of material fact existed regarding his paternity. But the burden never shifted to Father because Adoptive Parents did not designate any evidence to exclude Father as Child's legal father.

[22] Here, Adoptive Parents filed their motion for summary judgment on the faulty premise that excluding Father as Child's biological father negated the need for his consent to the adoption. However, as we have discussed, the fact that a man is not a Child's biological father does not demonstrate that he is not

Child's legal father or that his consent is not required.[5] Thus, Adoptive Parents are not entitled to judgment as a matter of law. *See* Trial Rule 56(C).

[23] In sum, the facts alleged by Adoptive Parents fail to demonstrate that Father's consent to the adoption is not required. Adoptive Parents' designated evidence did not exclude Father as Child's legal father. As a result, they did not meet their burden, and a genuine issue of material fact remains as to whether Father has established his paternity such that his consent is required under Indiana Code 31-19-9-1(a)(2). Thus, we reverse the court's entry of summary judgment in favor of Adoptive Parents. And we remand with instructions for the court to determine whether Father is, in fact, Child's legal father and for further proceedings not inconsistent with this opinion.[6]

Conclusion

[24] Father has not met his burden on appeal to demonstrate that the court erred when it ordered him to submit to a DNA test. Further, evidence that a man is not a child's biological father, without more, is not dispositive of whether he is the child's legal father or obviate the need for his consent to an adoption. And

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[5] Indeed, this Court has recently affirmed the trial court's dismissal of a petition to establish paternity filed by a child's biological father when another man had executed a paternity affidavit. *See e.g., Litton v. Baugh*, 122 N.E.3d 1034, 1043 (Ind. Ct. App. 2019) (holding that a petition by a child's mother and biological father to establish paternity in the biological father was improper where another man had established himself as the child's legal father through the execution of a paternity affidavit).

[6] We note that Adoptive Parents additionally asserted in their adoption petition that Father's consent is not required under Indiana Code Section 31-19-9-8 because Father is unfit, he failed to communicate significantly with Child, he abandoned or deserted Child, and he failed to support Child when able. Should the court conclude that Father's consent is required under Indiana Code Section 31-19-9-1(a)(2), the court must still determine whether Father's consent is not required under Indiana Code Section 31-19-9-8.

Adoptive Parents have failed to designate evidence that would exclude Father as Child's legal father such that Father's consent would not be required under Indiana Code Section 31-19-9-1(a)(2). We therefore affirm in part, reverse in part, and remand.

[25] Affirmed in part, reversed in part, and remanded for further proceedings.

Bradford, C.J., and Bailey, J., concur.