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IN THE COURT OF APPEALS OF INDIANA

In re: The Adoption of W.K. IV and I.K.

W.K. III,

Appellant-Intervenor,

v.

T.M.,

Appellee-Petitioner

March 4, 2021

Court of Appeals Case No. 20A-AD-1455

Appeal from the Hamilton Superior Court

The Honorable Michael A. Casati, Judge

Trial Court Cause Nos. 29D01-1904-AD-524 29D01-1904-AD-525

Vaidik, Judge.

Case Summary

[1] W.K. III ("Father") appeals the trial court's order finding his consent to the adoption of his children by their stepfather is not required. We reverse.

Facts and Procedural History

[2] C.M. ("Mother") and Father married in March 2008 while both were on active duty in the military. They later had two children, W.K. IV, born in December 2008, and I.K., born in April 2010 (collectively, "the children"). During their marriage, Mother and Father lived in various locations due to military deployment. They separated several times.

[3] Father left the military in July 2011 and moved without Mother and the children from Japan to Texas, where he works for a construction company. Mother left the military in July 2013 and moved with the children from Japan to California. Mother filed for divorce in California in September 2013, and the divorce was finalized in March 2014. According to the divorce decree, Mother and Father shared legal custody of the children, with Mother having physical custody. Father was awarded parenting time "every summer and every other winter break with potential for discussion for spring break or Thanksgiving holiday depending on [F]ather's availability." Appellant's App. Vol. II p. 39. No child support was ordered at the time. *See id.* at 43.

[4] Mother started dating T.M. ("Stepfather"), whom she met in the military. Mother and the children moved to Indiana in 2014. Father also started informally paying child support to Mother in 2014. *See* Tr. Vol. II p. 19; Ex. A, pp. 159-66. That summer, the children started spending their summers in Texas with Father. In late 2016, Father was formally ordered to pay child support. *See* Tr. Vol. II pp. 20, 25; Ex. K, pp. 170-71.

[5] In December 2016, Mother married Stepfather, and they lived with the children in Westfield, Indiana, where Stepfather is a police officer. The children continued spending their summers in Texas with Father. Mother gave birth to a child with Stepfather in February 2019, at which point it was discovered she had stomach cancer. Mother died on March 28.

[6] Four days later, on April 1, Stepfather filed a petition to adopt the children in Hamilton Superior Court. Stepfather alleged Father's consent to the adoption of the children was not required under Indiana Code section 31-19-9-8. Appellant's App. Vol. II pp. 112, 115; Appellant's App. Vol. III p. 166. The court appointed a guardian ad litem (GAL) and set a hearing for April 10.

[7] Following the April 10 hearing, the trial court ordered:

> The Court does now Order that [Stepfather] shall have temporary custody of [the children] until 7 days after the last day of the children's 2018-19 school year. Thereafter, temporary custody shall be transferred to [Father] until further Order of the Court, and [Father] shall be responsible for providing the transportation for said transfer.

Appellant's App. Vol. II p. 138. When the school year ended, the children moved to Texas to be with Father.

[8] On July 26, Stepfather filed a "Petition for Emergency Hearing for Return of Child[ren] to Indiana" alleging:

> 2. That heretofore, by Order of the Court, the [children were] allowed to go to the State of Texas for the summer months to reside with [Father].
>
> 3. That [Father] has failed and refused to return the [children] to the State of Indiana.
>
> 4. That it is imperative that the [children] be returned to the State of Indiana for the commencement of school on August 6.

Id. at 195. Contrary to the allegations in Stepfather's petition, the court's April order did **not** say Father could only have the children for the summer. Rather, the April order said temporary custody would be transferred to Father "until further Order of the Court." But on July 30 the trial court set an emergency hearing for August 2. On the morning of the hearing, Father, who was not represented by counsel, requested a continuance due to the short notice and the fact he lived in Texas. In the alternative, Father asked to appear telephonically. The court denied Father's request to continue the hearing but allowed him to appear telephonically. Following the hearing, the court ordered:

> The children are Ordered to be returned to the temporary custody of [Stepfather] on or before 6:00 p.m. on August 5, 2019, and to remain in his temporary custody until further order of the Court, with the exception that if this matter is still pending when the children have fall school break, [Father] shall have parenting time with the children at such time.

Id. at 223-24. When Father did not return the children as ordered by the court, he was charged with two counts of Level 6 felony interference with custody in

Hamilton County. *See* Case No. 29D04-1908-F6-7218. Father was arrested in Texas in September, at which point Stepfather drove to Texas and brought the children back to Indiana.

[9] On December 17, 2019, and April 28, 2020, the trial court held a hearing on the issue of whether Father's consent was required for Stepfather's adoption of the children. The GAL testified and submitted a report. According to the GAL, she had "never been more concerned for any children for whom [she had] served than those two children." Tr. Vol. II pp. 190-91. The GAL testified about Father drinking alcohol, "sharing cigarettes with friends in [his] garage," using corporal punishment on the children, and committing an act of domestic violence against Mother (presumably when they still lived together). *Id.* at 159. In addition, the GAL testified she believed Father was trying to "intimidate" her when she went to Texas in June 2019 to interview the children. *Id.* at 186.

[10] In July 2020, the trial court issued an order finding: (1) Father failed without justifiable cause to communicate significantly with the children when able to do so "beginning in 2013 for a period of not less than 12 months"; (2) Father knowingly failed to provide for the care and support of the children when able to do so "for one or more period(s) of time of 12 months or more," namely, "in 2013 and 2014"; and (3) Father is unfit and it is in the best interests of the children that his consent be dispensed with. *See* Appellant's App. Vol. III pp. 224, 225, 226.

[11] Father now appeals.

Discussion and Decision

[12] A natural parent enjoys special protection in any adoption proceeding, and courts strictly construe our adoption statutes to preserve the fundamentally important parent-child relationship. *In re Adoption of I.B.*, No. 21S-AD-90 (Ind. Mar. 2, 2021). "[U]nder carefully enumerated circumstances," the adoption statutes allow "the trial court to dispense with parental consent and allow adoption of the child." *Id.* (quotation omitted).

[13] Father contends the trial court erred in determining his consent to the adoption of the children was not required. Indiana Code section 31-19-9-8(a) provides consent is not required from:

* * * * *

> (2) A parent of a child in the custody of another person if for a period of at least one (1) year the parent:
>
> > (A) fails without justifiable cause to communicate significantly with the child when able to do so; or
> >
> > (B) knowingly fails to provide for the care and support of the child when able to do so as required by law or judicial decree.
>
> * * * * *
>
> (11) A parent if:

> (A) a petitioner for adoption proves by clear and convincing evidence that the parent is unfit to be a parent; and
>
> (B) the best interests of the child sought to be adopted would be served if the court dispensed with the parent's consent.

A petitioner for adoption without parental consent must prove, "by clear and indubitable evidence," one of the statutory criteria allowing for adoption without consent. *E.W. v. J.W.*, 20 N.E.3d 889, 894 (Ind. Ct. App. 2014), *trans. denied*.

I. Failure to Communicate under Section 31-19-9-8(a)(2)(A)

[14] Father first argues that even assuming he failed to communicate significantly with the children for at least one year beginning in 2013, which he disputes, the finding does not support the trial court's conclusion his consent is not required for the children's adoption because he communicated significantly with the children since 2013, including having parenting time with them every summer starting in 2014. In support of his argument, Father cites *E.W.* In that case, a grandmother petitioned to adopt her grandchild. The trial court denied the petition, finding the mother's consent was required, and the grandmother appealed. On appeal, we held that even if the mother did not communicate significantly with her child between May 2010 and May 2011, it was "undisputed" her communication "increased in the two years after May 2011."

Id. at 896. As we explained it, "It would defy logic to allow a long-past, one-year period of poor communication to overcome a lengthy period of significant communication that immediately precedes the adoption petition." *Id.*

[15] The same can be said here. According to the parties' divorce decree, Father was awarded summer parenting time with the children, which he started exercising in 2014. *See* Tr. Vol. II pp. 46, 217 (Stepfather acknowledging the children spent summers in Texas with Father), 11 (maternal grandmother acknowledging the children spent summers in Texas with Father). Father also had the children for several months after Mother's death. It would defy logic to allow Father's alleged one-year period of no communication in 2013 to overcome his more recent regular exercise of parenting time with the children, including from 2014 to 2019.

II. Failure to Support under Section 31-19-9-8(a)(2)(B)

[16] Father next argues that even assuming he failed to provide for the care and support of the children when able to do so "for one or more period(s) of time of 12 months or more" "in 2013 and 2014," which he disputes, the finding does not support the court's conclusion Father's consent is not required for the children's adoption. As noted above, Father started exercising summer parenting time with the children in 2014, and he supported the children while they were with him. In addition, Father started informally paying child support in 2014 and was ordered to pay child support in late 2016. Similar to above, it would defy logic to allow Father's alleged one-year period of not supporting the

children in 2013 and 2014 to overcome his more recent support of the children, including from 2014 to 2019.

III. Unfitness under Section 31-19-9-8(a)(11)

[17] Last, Father argues the trial court erred in finding he is unfit. Although Section 31-19-9-8(a)(11) does not define "unfit," we have held it means "unsuitable." *See In re Adoption of M.L.*, 973 N.E.2d 1216, 1223 (Ind. Ct. App. 2012). In addition, we have held that statutes concerning the termination of parental rights and adoption "strike a similar balance between the parent's rights and the child's best interests" and thus termination cases provide useful guidance in determining whether a parent is unfit. *K.H. v. M.M.*, 151 N.E.3d 1259, 1267 (Ind. Ct. App. 2020), *trans. denied*. Termination cases have considered factors such as a parent's substance abuse, mental health, willingness to follow recommended treatment, lack of insight, instability in housing and employment, and ability to care for a child's special needs. *Id.* A parent's criminal history is relevant to whether the parent is unfit under Section 31-19-9-8(a)(11). *Id.* at 1268.

[18] As Father notes, the trial court's finding he is unfit is largely based on the fact he has been charged with two counts of Level 6 felony interference with custody. *See* Appellant's App. Vol. III pp. 226-31. But these charges, which are still pending, are wrapped up with the merits of this case. That is, in April 2019, after Mother died, the trial court awarded temporary custody of the children to Father, and the children moved to Texas after the school year ended. However,

on July 26, Stepfather requested an emergency hearing so the children could be returned to Indiana to attend school. The basis of Stepfather's motion was the children were only supposed to go to Texas for the summer. But the court's April 2019 order says nothing of the sort. With only a couple days' notice, Father, who was not represented by counsel, requested a continuance, which the court denied. After the hearing, the court ordered Father to return the children to Indiana. Although keeping the children in Texas despite the court's order was a stupid thing for Father to do, under these circumstances it does not make him unfit.

[19] This then leaves the other reasons noted by the GAL, such as Father drinking alcohol, "sharing cigarettes with friends in [his] garage," using corporal punishment on the children, and committing an act of domestic violence against Mother. While the GAL undoubtedly had negative things to say about Father in her forty-page report, the GAL never relayed her concerns to the appropriate authorities in either Texas or Indiana, which is curious given her claim she has "never been more concerned for any children for whom [she had] served than those two children." Instead, the record shows Father has been exercising parenting time with the children since his and Mother's divorce in March 2014 and was awarded temporary custody of the children after Mother's death in 2019. While Father is not perfect, none of the concerns relayed by the GAL rise to the level of unfitness required to essentially terminate Father's parental rights to the children. And tellingly, the only cases Stepfather cites to support the finding Father is unfit under Section 31-19-9-8(a)(11) are cases

where the parents had a significant criminal history and were serving lengthy sentences. *See In re Adoption of H.N.P.G.*, 878 N.E.2d 900, 907 (Ind. Ct. App. 2008) ("Due to his incarceration, Blake has never met or communicated with H.N.P.G. He has a substantial history of illegal drug use and has used drugs since he was a juvenile. He is currently incarcerated due to his convictions for dealing in methamphetamine and possession of precursors with intent to manufacture methamphetamine. His earliest possible release date is in 2010 and he may not be released until 2017, at which time H.N.P.G. will be approximately thirteen years old."), *trans. denied*; *In re Adoption of T.W.*, 859 N.E.2d 1215, 1218 (Ind. Ct. App. 2006) ("The evidence most favorable to the trial court's judgment reveals that White has been unable to care for the Children largely because of his drug use and criminal convictions. He received sentences totaling twenty-one and one-half years, having been convicted of criminal recklessness and dealing methamphetamine. At the time of the adoption hearing, White was on house arrest. He testified that, for seven future years, he could leave his home to go to work, or as granted permission by his probation officer."). The trial court erred in finding Father is unfit. We therefore reverse the court's determination Father's consent is not required for Stepfather's adoption of the children.[1]

[20] Reversed.

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[1] In light of this conclusion, we do not need to reach the other issues raised by Father.

Brown, J., and Pyle, J., concur.