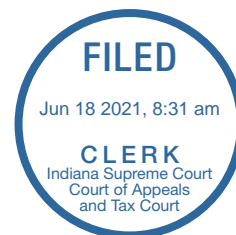


MEMORANDUM DECISION

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

In Re the Matter of the Adoption
of Z.H. (Minor Child)

D.H. and A.H.,

Appellants-Petitioners,

v.

S.G.,

Appellee-Respondent.

June 18, 2021

Court of Appeals Case No.
20A-AD-1973

Appeal from the Madison Circuit
Court

The Honorable Angela Warner
Sims, Judge
The Honorable C. William Byer,
Jr., Commissioner

Trial Court Cause No.
48C01-1701-AD-4

Weissmann, Judge.

[1] D.H. and A.H. (Maternal Grandparents) sought to adopt their newborn granddaughter. After S.G. (Father) filed a paternity action and objected to their adoption of his daughter, Maternal Grandparents failed to notify him or the trial court of their moves with the child across the state and then across the country. The trial court deferred Father's requests for parenting time until the adoption proceeding was over, and his numerous attempts to financially support the child failed. The trial court found that Father's lack of contact with and support of the child under these circumstances did not negate the need for his consent to the adoption. We agree and affirm the trial court's denial of Maternal Grandparents' adoption petition.

Facts

- [2] S.H. (Mother) gave birth to Z.H. in late December 2016 in Anderson. One month later, S.H.'s parents (Maternal Grandparents) petitioned to adopt Z.H., alleging that Mother consented to the adoption and the father's identity was unknown. Appellant's App. Vol. II, pp. 17-18. Maternal Grandparents have cared for and financially supported Z.H. since her birth.
- [3] Five months after Z.H.'s birth, Father petitioned to establish his paternity and support obligations. Maternal Grandparents successfully sought to intervene in the paternity action and to consolidate that proceeding with the adoption

action. DNA testing established Father was the parent of Z.H.¹ Father objected to Maternal Grandparents' petition to adopt. Maternal Grandparents thereafter moved with Z.H., first to Fort Wayne and then to California, without informing Father or the trial court of their new addresses.

[4] At a hearing in September 2018, the trial court indicated the proceeding would have to be continued to allow for a preliminary determination of the validity of Mother's consent to the adoption. Father objected to the continuance and sought a preliminary order granting him parenting time with Z.H. The court overruled his objection and declined to grant his parenting time request. Supp. Tr., pp. 13-15. The trial court indicated that its determination as to the validity of Mother's consent would dictate whether the court would convene the paternity portion of the consolidated action. *Id.* at 15.

[5] The court appointed counsel for Mother, who subsequently failed to contact her counsel. The court ultimately determined Mother's consent would stand and that Father's consent to the adoption was required. The court denied Maternal Grandparents' two motions to correct error. After Maternal Grandparents initiated this appeal, this Court remanded to the trial court for a ruling on

¹ The parties ask this Court to take judicial notice of the paternity action. However, as the trial court consolidated the paternity action with the adoption proceeding for purposes of hearing, both actions remain consolidated on appeal and, therefore, automatically are before this Court for consideration absent a successful objection from a party. *See* Ind. Appellate Rule 38(A).

Maternal Grandparents' petition for adoption. The trial court denied that petition, and this Court resumed jurisdiction and ordered briefing.

Discussion and Decision

- [6] Maternal Grandparents challenge the trial court's determinations that Father's consent was necessary and that their adoption petition, to which Father objected, should be denied.

I. Standard of Review

- [7] The party challenging a trial court's rulings in an adoption case bears the burden of overcoming the presumption that the trial court's decision is correct. *In re Adoption of E.M.M.*, 164 N.E.3d 779, 781 (Ind. Ct. App. 2021). In determining whether the challenging party has met that burden, we will examine only the evidence most favorable to the trial court's judgment, neither reweighing the evidence nor assessing the credibility of witnesses. *Id.* at 782. We will not disturb the trial court's decision unless the evidence at trial leads to but one conclusion opposite of that reached by the trial court. *Id.* at 781-82.

II. Father's Consent Was Necessary

- [8] Maternal Grandparents contend the trial court erroneously denied their petition to adopt Z.H. based on its determination that Father's consent was necessary. The written consent of biological parents to an adoption of their child generally is required in an adoption. *E.W. v. J.W.*, 20 N.E.3d 889, 894 (Ind. Ct. App. 2014), *trans. denied*; Ind. Code § 31-19-9-1(a) ("Except as otherwise provided in

this chapter, a petition to adopt a child . . . may be granted only if written consent to adoption has been executed by . . . [t]he mother of a child born out of wedlock and the father of a child whose paternity has been established. . . .”).

[9] A biological parent’s consent to adoption is not required where the child has been in the custody of another person for at least a year if clear and convincing evidence establishes that the parent: 1) fails without “justifiable cause to communicate significantly with the child when able to do so”; or 2) “knowingly fails to provide for the care and support of the child when able to do so as required by law or judicial decree.” Ind. Code § 31-19-9-8(a)(2); *In re Adoption of E.B.*, 163 N.E.3d 931, 936 (Ind. Ct. App. 2021). Maternal Grandparents claim Father’s consent is not required under Indiana Code § 31-19-9-8(a)(2) because at the time of the hearing, Father had never paid support for Z.H. and had never communicated with Z.H., who then was three years old. Each side blames the other for the lack of communication and support.

[10] What is clear is that Father first sought a visitation and support order when Z.H. was five months old. Father’s paternity was not established through DNA testing until Z.H. was almost ten months old. And in 2017, once the paternity test results were available, Father filed his objection to the adoption and separately sought a hearing on paternity, custody, and parenting time issues. Appellant’s App. Vol. II, p. 31; Appellee’s App. Vol. II, p. 20. Father’s efforts to gain a court order of visitation were unsuccessful. Supp. Tr., p. 15; Appellant’s App. Vol. II, pp. 12-13.

- [11] Maternal Grandparents' moves from Anderson to Fort Wayne the following year and from Fort Wayne to California thereafter were done without notice to Father or the court. Maternal Grandparents also did not provide their address to Mother. Tr. Vol. II, pp. 24-25. Maternal Grandmother did not know where Mother lived, although they were in contact on social media. Tr. Vol. II, p. 25. Maternal Grandparents did nothing to obtain their mail received by the new owner of their Anderson home, although that was the only mailing address that Maternal Grandparents had revealed during the years of litigation prior to the hearing on the necessity of Father's consent.
- [12] After Maternal Grandparents' move, they failed to prosecute the adoption action, which already had been delayed by Mother's failure to meet with her appointed counsel. Maternal Grandparents' inaction prompted the trial court to order that they show cause why the adoption should not be dismissed.
- [13] Although Father's lack of communication with Z.H. is undisputed, Maternal Grandparents failed to prove by clear and convincing evidence, as required by Indiana Code § 31-19-9-8(a)(2), that Father also had the ability to communicate with Z.H. during that period. *See Rust v. Lawson*, 714 N.E.2d 769, 772 (Ind. Ct. App. 1999), *trans. denied* (ruling that parties petitioning to adopt without parental consent have the burden of proving the parent's lack of communication, as well as the parent's ability to communicate, during the statutory period).

[14] The trial court never granted Father parenting time or authorized him to have any other contact with Z.H. prior to its judgment, despite Father’s repeated requests. Maternal Grandparents did not reveal their whereabouts to Father for much of the case. Even if they had, nothing in the record suggests Maternal Grandparents would have allowed Father to visit with Z.H. absent a court order. Maternal Grandparents even acknowledge that Father was “maybe even unable, to establish communications with Z.H. in a less formal manner” than a request to the court. Appellants’ Br., p. 16.

[15] Maternal Grandparents similarly failed to prove by clear and convincing evidence that Father failed to support Z.H. Father testified that between August 2018 and May 2019, he sent 36 checks to the Anderson address of Maternal Grandparents—the only address Maternal Grandparents ever provided prior to the consent hearing. All the envelopes, which were addressed to Maternal Grandparents’ former home in Anderson but did not contain their name, were returned by mail to Father unopened. The trial court admitted those envelopes, still unopened, at the hearing on the necessity of Father’s consent. Ex., pp. 2-39. Unaware that Maternal Grandparents had moved, Father thought Maternal Grandparents simply were rejecting his support. He ultimately stopped sending the checks after the 36 failed attempts.

[16] Maternal Grandmother was aware that the new owner of her home in Anderson was continuing to receive Maternal Grandmother’s mail more than a year after Maternal Grandparents’ move, but she declined to provide her

forwarding address to the new owner or to the former neighbor who alerted Maternal Grandmother to the unforwarded mail. Tr. Vol. II, pp. 53-54.

[17] Father provided support. Maternal Grandparents' actions in failing to reveal their whereabouts simply resulted in rejection of that support. In light of all this evidence, the trial court properly concluded that, "[a]s a result of the delayed Court proceeding(s), . . . the evidence does not demonstrate the Father failed without justifiable cause to communicate with the child or that he failed to care and support the child as required by law or judicial decree." App. Vol. II, p. 12.

[18] Maternal Grandparents' final claim is that Father's consent was unnecessary because Father's paternity was never established. *See* Ind. Code § 31-19-9-8(a)(3) (consent to adoption is not required from a "biological father of a child born out of wedlock whose paternity has not been established ... by a court proceeding other than the adoption proceeding"). Maternal Grandparents argue that the record contains no specific paternity order. But Maternal Grandparents never challenged and essentially admitted Father's paternity during the hearing on the necessity of Father's consent. Specifically, Maternal Grandmother testified that the DNA tests confirmed Father's paternity. Tr. Vol. II, pp. 15-16. Maternal Grandparents failed in their burden of proving by clear and

convincing evidence that Father’s consent to their adoption of Z.H. was unnecessary under Indiana Code § 31-19-9-8(a)(3).²

[19] As Father’s consent was required but not granted, the trial court properly denied Maternal Grandparents’ petition to adopt Z.H. We therefore affirm the trial court’s judgment.

[20] Kirsch, J., and Altice, J., concur.

²In its judgment finding Father’s consent to Z.H.’s adoption was required, the trial court specified that “paternity results were filed with the court 09/26/2017 establishing” Father to be the parent of Z.H. and that “[p]aternity is not an issue.” Appellant’s App. Vol. II, pp. 11-12. That order lists only the adoption case number but was entered on the CCS in the paternity action because the two proceedings were consolidated. Maternal Grandparents do not challenge, and we need not decide, whether such an order establishes paternity “by a court proceeding other than the adoption proceeding,” as required by Indiana Code § 31-19-9-8(a)(3).

Maternal Grandparents also have never raised Indiana Code § 31-19-9-8(a)(6), which negates the need for consent to an adoption from the “biological father of a child born out of wedlock if the . . . father’s paternity is established after the filing of a petition for adoption in a court proceeding . . . [and] father is required to but does not register with the putative father registry established by IC 31-19-5 within the period required by IC 31-19-5-12.” Therefore, we also need not address that provision.