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EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c);
Ariz. R. Crim. P. 31.24



DIVISION ONE
FILED: 04/29/10
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IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

NEKETA O.,) No. 1 CA-JV 09-0223
)
Appellant,) DEPARTMENT A
)
v.) **MEMORANDUM DECISION**
) (Not for Publication -
JOSHUA F., TAMELA F., IVAUGHNTE) 103(G) Ariz. R.P. Juv.
O.,) Ct.; Rule 28 ARCAP)
)
Appellees.)
)
_____)

Appeal from the Superior Court in Maricopa County

Cause No. JA 509888

The Honorable Thomas A. Kaipio, Judge *Pro Tem*

AFFIRMED

Robert D. Rosanelli, Phoenix
Attorneys for Appellant
Schmitt, Schneck, Smyth & Herrod, P.C. Phoenix
By Michael J. Herrod
Abigail J. Toth
Attorneys for Appellees

D O W N I E, Judge

¶1 Neketa O. appeals the juvenile court's denial of her petition to revoke consent to the adoption of her son ("the child"). For the following reasons, we affirm.

FACTS AND PROCEDURAL HISTORY¹

¶12 Neketa gave birth to the child on May 23, 2009. For several months before the birth, she talked with L.R. of Agape Adoption Agency of Arizona, Inc. ("Agape") about placing the child for adoption. On April 3, 2009, Neketa met Joshua F. and Tamela F. ("the adoptive parents"). They agreed to proceed with an open adoption.²

¶13 Neketa originally planned to sign adoption consent paperwork at home on May 26, 2009. That plan changed, however, because Neketa was worried that the paternal grandmother, who was opposed to the adoption, wanted to attend and because she incorrectly believed L.R. was sending a caseworker to ask about the adoption; in fact, the caseworker was a hospital employee following hospital protocol.

¶14 On June 1, 2009, Neketa met with the adoptive parents and stated that she wanted the child every weekend. Because this was unacceptable to the adoptive parents, they decided not to proceed with the adoption. Later that day, Neketa sent Tamela a text message, asking if they were interested in

¹ We view the facts in the light most favorable to upholding the juvenile court's order. *Manuel M. v. Ariz. Dep't of Econ. Sec.*, 218 Ariz. 205, 207, ¶ 2, 181 P.3d 1126, 1128 (App. 2008) (citation omitted).

² In an open adoption, the adoptive parents continue communicating with the birth parent(s) after the adoption is finalized.

becoming godparents instead. Tamela said they were not. Neketa then replied, "Wish we could of [sic] worked something out for the baby [sic] sake."

¶15 Tamela testified that Neketa sent her another text message, stating, "We could have did [sic] every weekend until he turned a couple of months old. . . . I want to work something out with you and Josh because you all are good people. If we did every other weekend, when would it start and when would you all pick up the baby?" The adoptive parents agreed that every other weekend would work. Neketa replied, "Was josh ok with me keeping the baby until [T]uesday and i would thank yall for taking my son in i really love him with all of my heart."

¶16 On June 3, 2009, Neketa signed a consent to adopt. Approximately four days later, she began telling Tamela she was stressed and that "this is really hard for me." She said her father was upset with her.³ Neketa began asking the adoptive parents to bring the child to her. She stated, "This is not working for me my dad told me this was going to happen I [] am getting real upset i see how it is going to be." The tone of the calls and text messages became increasingly hostile, with Neketa demanding the child back and threatening to call the police. As a result, the adoptive parents changed their phone number.

³ Neketa was 26 years old when the child was born.

¶17 On June 19, 2009, the adoptive parents filed an adoption petition. On June 29, 2009, Neketa sent a letter to the court, stating she "would like to stop the adoption" because the adoptive parents had changed their phone number so she could not reach them and had failed to comply with an alleged agreement that she "would have [the child] one day of the weekday and every other weekend." Neketa also alleged that L.R. and the adoptive parents harassed her after she told them she changed her mind about the adoption. Neketa claimed to have signed the consent while "under stress about the [adoption]."

¶18 At a hearing on August 26, 2009, the juvenile court decided to treat Neketa's letter as a petition to revoke her consent pursuant to Arizona Rule of Procedure for the Juvenile Court ("Rule") 82. She was appointed counsel, and an evidentiary hearing was set.

¶19 The evidentiary hearing occurred in November 2009. After considering testimony from Neketa, L.R., the adoptive mother, and Neketa's mother, the court concluded that consent to the adoption "was given freely and voluntarily, and that it was not procured by fraud, duress or undue influence." The court thus denied Neketa's petition.

¶10 Neketa timely appealed. We have jurisdiction pursuant to Arizona Revised Statutes ("A.R.S.") sections 8-235(A) (2007), 12-120.21(A)(1) (2003), and -2101(B) (2003).

DISCUSSION

¶11 Pursuant to A.R.S. § 8-106(D) (Supp. 2009), “[a] consent to adopt is irrevocable unless obtained by fraud, duress or undue influence.” *Accord In re Navajo County Juv. Action No. JA-691*, 171 Ariz. 369, 374, 831 P.2d 368, 373 (App. 1991) (“[A] consent to adoption cannot be revoked just because the natural parent changes his or her mind.”). See also *In re Appeal in Yuma County, Juv. Action Nos. J-81-339 & J-81-340*, 140 Ariz. 378, 382, 682 P.2d 6, 10 (App. 1984) (“A mere change of mind is insufficient. Once the adoptive process has begun, the integrity of the adoption process must have some degree of protection. Otherwise, in every case the adoption process would be subject to interruption at the whim of the natural parent.”). To set aside her consent, Neketa “must prove by clear and convincing evidence the grounds to do so.” *JA-691*, 171 Ariz. at 371, 831 P.2d at 370.

¶12 Neketa contends there was insufficient evidence to support the court’s finding that her consent was not invalid and not secured by fraud, duress and undue influence. In reviewing that claim, we note that an appellate court “will not substitute its own opinion for that of the trial court, and findings of the trial court will be upheld unless they are unsupported by the evidence.” *In re Appeal in Maricopa County Juv. Action No. A-*

25525, 136 Ariz. 528, 533, 667 P.2d 228, 233 (App. 1983)
(citations omitted).

1. Duress

¶13 Duress sufficient to set aside consent to adoption requires proof of:

[A]ny wrongful act of one person that compels a manifestation of apparent assent by another to a transaction without his volition, or . . . any wrongful threat of one person by words or other conduct that induces another to enter into a transaction under the influence of such fear as precludes him from exercising free will and judgment, if the threat was intended or should reasonably have been expected to operate as an inducement.

Anonymous v. Anonymous, 23 Ariz. App. 50, 51-52, 530 P.2d 896, 897-98 (1975) (quoting *Lundvall v. Hughes*, 49 Ariz. 264, 267, 65 P.2d 1377, 1378 (1937)).

¶14 There is no evidence of any wrongful act by the adoptive parents that compelled Neketa to sign the consent; nor was a "wrongful threat" made. When asked whether anyone had threatened her "in any way" to sign the consent, Neketa replied, "No, I wasn't threatened." Tamela testified she made no representations or promises to persuade Neketa to go forward with the adoption.

¶15 There is also no evidence the consent was signed against Neketa's volition. Between May 25 and June 3, Tamela never communicated to Neketa that she wanted her to consent.

Rather, after the adoptive parents decided to abandon the adoption, it was Neketa who contacted them about signing the consent and "working out" an agreement. When Tamela returned her call, she felt that Neketa was willing to sign the consent and that Neketa believed adoption was in the child's best interest. Tamela testified that if Neketa had communicated any intent not to sign, they would not have proceeded with the adoption.

2. Undue Influence

¶16 At trial, Neketa's counsel argued that "the crux of the case" was "the undue influence and . . . a representation that was made to mother to essentially induce her into signing that consent." The record, however, does not support this claim.

¶17 "Undue influence is unfair persuasion of a party who is under the domination of the person exercising the persuasion or who by virtue of the association between them is justified in assuming that person will not act in a manner inconsistent with his welfare." Restatement (Second) of Contracts § 177(1) (1981). *Accord Parrisella v. Fotopulos*, 111 Ariz. 4, 6, 522 P.2d 1081, 1083 (1974); *Evans v. Liston*, 116 Ariz. 218, 220, 568 P.2d 1116, 1118 (App. 1977). Although L.R. testified that the relationship between Neketa and the adoptive parents was "the closest [she has] ever seen between a birth mom and a

perspective [sic] adoptive family," Neketa does not claim she was persuaded to sign the consent due to conduct arising from that relationship. See *In re Sherer's Estate*, 10 Ariz. App. 31, 35, 455 P.2d 480, 484 (1969) (finding that a showing of a mere opportunity to influence, e.g., marital relationship, is insufficient). Nothing indicates the adoptive parents were in a position of dominance over Neketa or that her volition was compromised when she signed the consent. As discussed *supra*, it was Neketa who re-initiated contact after the adoptive parents walked away, and it was she who persuaded them to proceed with the adoption.

3. Fraud

¶18 Neketa also argues that Tamela fraudulently obtained her consent by misrepresenting a material fact. Specifically, she claims Tamela falsely promised that Neketa could revoke her consent within ninety days of signing. Tamela denied making such a representation and testified that the only discussion she had with Neketa about a "90-day period" related to the court setting a finalization hearing within "90 days" of the adoption petition being filed.

¶19 It was up to the juvenile court to weigh the conflicting testimony and make credibility determinations. The court did not abuse its discretion by giving Tamela's version of events more credence. See *JA-691*, 171 Ariz. at 372, 831 P.2d at

