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Kevin L. Smith

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tax court

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**IN THE
COURT OF APPEALS OF INDIANA**

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APPEAL FROM THE ST. JOSEPH PROBATE COURT
The Honorable J. Eric Smithburn, Senior Judge
Cause No. 71J01-0902-AD-18

May 26, 2010

MEMORANDUM DECISION – NOT FOR PUBLICATION

BARNES, Judge

Case Summary

R.O. (“Mother”) appeals the trial court’s grant of a petition to adopt T.L.J. filed by C.J. (“Stepmother”). We affirm.

Issue

Mother raises one issue, which we restate as whether the trial court erred by finding that Mother’s consent to Stepmother’s petition to adopt T.L.J. was unnecessary.

Facts

T.L.J. was born on April 24, 1999, to Mother and P.J. (“Father”). On December 12, 2000, the trial court granted custody of T.L.J. to Father, and Mother was granted parenting time. Mother was ordered to pay \$46.00 per week in child support for T.L.J. From March 2002 to June 2002, Mother had supervised visitations with T.L.J. because of allegations of drug use. Mother then had unsupervised parenting time on Tuesday and Thursday evenings and every other weekend.

Father married Stepmother in July 2003. In 2003, Mother had parenting time almost eighty times with T.L.J. In 2004, Mother had parenting time with T.L.J. forty times. In 2005, Mother had parenting time with T.L.J. about thirty times. During 2006, Mother had parenting time with T.L.J. only eleven times. Mother often cancelled scheduled parenting time or did not show up to pick T.L.J. up. Mother last had parenting time with T.L.J. on October 28, 2006.

Mother last paid child support for T.L.J. in September 2006. She lost her job in September 2006, and she made no more support payments because “[t]he money just

wasn't there." Tr. p 16. Mother got another job in September 2007, but she did not resume paying child support.

According to Father and Stepmother, Mother called only two times in 2007 and left messages. According to Mother, she called numerous times and drove past the house numerous times, but she did not stop or knock on the door. Mother did not file any court actions to enforce her parenting time. Mother sent a box to T.L.J. from L.M., T.L.J.'s younger half-brother, in March 2008, but it was marked "refused" and "return to sender." Id. at 50.

On April 20, 2009, Stepmother filed a petition to adopt T.L.J., and Father consented to the adoption. After a hearing, the trial court entered findings of fact and conclusions thereon granting Stepmother's petition to adopt T.L.J. The trial court found that Mother's consent was not required because: (1) she failed to provide for T.L.J.'s care and support from September 2006 through April 2009 when able to do so as required by court order; and (2) she failed without justifiable cause to communicate with T.L.J. since October 2006 although she was able to do so.

Analysis

The issue is whether the trial court erred by finding that Mother's consent to Stepmother's petition to adopt T.L.J. was unnecessary. The trial court entered findings and conclusions sua sponte, and those findings and conclusions control only the issues they cover. Olcott Int'l. & Co., Inc. v. Micro Data Base Sys., Inc., 793 N.E.2d 1063, 1071 (Ind. Ct. App. 2003), trans. denied. We apply the following two-tier standard of review to sua sponte findings and conclusions: whether the evidence supports the

findings, and whether the findings support the judgment. Id. Findings and conclusions will be set aside only if they are clearly erroneous, that is, when the record contains no facts or inferences supporting them. Id. “A judgment is clearly erroneous when a review of the record leaves us with a firm conviction that a mistake has been made.” Id. We consider only the evidence favorable to the judgment and all reasonable inferences flowing therefrom, and we will neither reweigh the evidence nor assess witness credibility. Id.

Mother argues that the trial court erred by concluding that her consent to the adoption was not necessary. Indiana Code Section 31-19-11-1 provides that the trial court “shall grant the petition for adoption and enter an adoption decree” if the court hears evidence and finds, in part, that “proper consent, if consent is necessary, to the adoption has been given.” Indiana Code Section 31-19-9-8 provides, in part:

- (a) Consent to adoption, which may be required under section 1 of this chapter, is not required from any of the following:

* * * * *

- (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.

Stepmother had the “burden of proving that the parent’s consent to the adoption [was] unnecessary.” Ind. Code § 31-19-10-1.2(a). She was required to meet this burden by proving by clear and convincing evidence that Mother’s consent was not required under

Indiana Code Section 31-19-9-8(a). In re M.A.S., 815 N.E.2d 216, 220 (Ind. Ct. App. 2004).

A. Failure to Communicate.

The trial court found that Mother failed without justifiable cause to communicate with T.L.J. since October 2006 although she was able to do so. “One petitioning to adopt without parental consent has the burden of proving both a lack of communication for the statutory period and that the ability for communication during that time period existed.” Rust v. Lawson, 714 N.E.2d 769, 771 (Ind. Ct. App. 1999), trans. denied. “Whether this burden has been met is necessarily dependent upon the facts and circumstances of each particular case, including, for example, the custodial parent’s willingness to permit visitation as well as the natural parent’s financial and physical means to accomplish his obligations.” Id.

“Efforts of a custodial parent to hamper or thwart communication between parent and child are relevant in determining the ability to communicate.” Id. “Furthermore, under the present statute, the communication standard has an additional factor.” Id. “In order to preserve the consent requirement for adoption, the level of communication with the child must not only be significant, but it also must be more than ‘token efforts’ on the part of the parent to communicate with the child.” Id. (citing I.C. § 31-19-9-8(b)). “The reasonable intent of the statute is to encourage non-custodial parents to maintain communication with their children and to discourage non-custodial parents from visiting their children just often enough to thwart the adoptive parents’ efforts to provide a settled environment for the children.” Id.

Mother argues that she was not allowed to communicate with T.L.J. because Father hampered or thwarted her efforts to communicate with T.L.J. According to Mother, she called Father's residence, but her calls were never returned or answered. She also sent a package to T.L.J. in March 2008, but the package was returned unopened. Mother also claimed that she tried to get an attorney to enforce her parenting time but that she did not have enough money to hire an attorney.

Stepmother presented evidence that, although Mother was granted unsupervised parenting time on Tuesday and Thursday evenings and every other weekend in June 2002, Mother did not consistently exercise her parenting time. In 2003, Mother had parenting time almost eighty times with T.L.J. In 2004, Mother had parenting time with T.L.J. forty times. In 2005, Mother had parenting time with T.L.J. about thirty times. During 2006, Mother had parenting time with T.L.J. only eleven times. Mother often cancelled scheduled parenting time or did not show up to pick T.L.J. up. Mother last had parenting time with T.L.J. on October 28, 2006. Mother concedes that, although she drove past Father's house after October 2006, she never stopped and knocked on the door. Mother did not attempt to enforce her parenting time through court proceedings.

Stepmother presented evidence that Mother's parenting time with T.L.J. diminished from 2002 through 2006 and that Mother simply stopped visiting with T.L.J. after October 2006. Although Mother mailed T.L.J. a box more than a year later and left a couple of messages on the answering machine, those were only token efforts to communicate with T.L.J. Whether Father hampered or hindered Mother's communication was a matter of witness credibility, and we cannot reweigh the evidence

or judge the credibility of the witnesses. Rust, 714 N.E.2d at 771. We conclude that the trial court's finding that Mother failed to communicate with T.L.J. despite an ability to do so is not clearly erroneous, and Mother's consent to the adoption was unnecessary.

B. Failure to Provide Care and Support.

Additionally, the trial court found that Mother had failed to provide for T.L.J.'s care and support from September 2006 through April 2009 when able to do so as required by court order. Mother argues that the finding is erroneous because she was not able to pay the child support because she lost her job in 2006, her younger child was sick and hospitalized in 2006, her father and stepfather died, her mother became ill, she declared bankruptcy, and she had to help care for her autistic brother.

Stepmother presented evidence that, although Mother lost her job in September 2006, she started working again in September 2007. Stepmother also presented evidence of Mother's income from September 2007 through the time of the hearing. The trial court found Mother's inability to pay even "a \$10.00 payment to support [T.L.J.]" was not credible. App. p. 12. Mother's argument is a request that we reweigh the evidence and judge the credibility of the witnesses, which we cannot do. Rust, 714 N.E.2d at 771. The trial court's finding regarding Mother's failure to provide care and support for T.L.J. despite her ability to do so is not clearly erroneous.

Conclusion

The trial court's findings regarding Mother's failure to communicate with T.L.J. despite her ability to do so and Mother's failure to provide care and support for T.L.J. despite her ability to do so are not clearly erroneous. As a result, Mother's consent to

T.L.J.'s adoption by Stepmother was unnecessary. We affirm the trial court's grant of Stepmother's petition to adopt T.L.J.

Affirmed.

BAILEY, J., and MAY, J., concur.