

MEMORANDUM DECISION

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IN THE COURT OF APPEALS OF INDIANA

In re the Adoption of C.Y. and
J.Y.
J.Y. (Father) and C.L. (Mother),
Appellants,

v.

A.W. and P.W.,
Appellees.

October 31, 2022

Court of Appeals Case No.
22A-AD-365

Appeal from the Lawrence Circuit
Court

The Honorable Nathan G. Nikirk,
Judge

Trial Court Cause No.
47C01-2110-AD-51
47C01-2111-AD-52

Bailey, Judge.

Case Summary

- [1] J.Y. (“Father”) and C.L. (“Mother”), (collectively, “Parents”) appeal an order granting the petition of A.W. and P.W. (“Paternal Grandparents”) to adopt C.Y. and J.Y. (“Children”). Parents present the sole issue of whether they were denied due process because they lacked representation of counsel at the final adoption hearing. We reverse and remand for further proceedings.

Facts and Procedural History

- [2] Parents have seven children, none of whom are in their custody. Paternal Grandparents acted as guardians for C.Y., born in 2013, and J.Y., born in 2015. On October 29, 2021, Paternal Grandparents petitioned to adopt Children, alleging that parental consent to the adoption was not required pursuant to Indiana law.¹
- [3] Proceedings on the petition were bifurcated. On January 11, 2022, Parents appeared with court-appointed counsel and objected to dispensation of their consent. After a contested hearing, the trial court ruled that Parents’ consents to the adoptions was not necessary due to parental abandonment of Children. On May 16, 2022, Paternal Grandparents and their counsel appeared for a final

¹ See Ind. Code 31-19-9-8 (providing in relevant part that consent to an adoption is not required “if the child is adjudged to have been abandoned or deserted for at least six (6) months immediately preceding the date of the filing of the petition for adoption,” or when “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.”)

hearing to address the best interests of Children and the Paternal Grandparents' ability to provide support and education.² Parents were not present, and neither of their court-appointed attorneys was present. The following colloquy ensued:

Court: Madam court reporter, have you checked the hall for the parties?

Reporter: I have.

Court: And anyone present?

Reporter: No.

Court: Counsel, have you talked with either of the attorneys for the parents?

Petitioner's Attorney: Yes, Your Honor, I spoke with Bradley Swihart this morning, he is [Mother]'s attorney, he is in Orange County, and he said that he did have a conversation with his client regarding this hearing. I spoke with Justin Mills; he is in Harrison County this morning. He said that he spoke with his client this morning about [it] and advised his client to be here.

Court: Okay. Thank you. And I will note the time is 8:42. I've waited 12 minutes to start the hearing; neither party is present. With that, counsel we are here for a final hearing on the adoption. Witnesses or evidence?

² See Ind. Code § 31-19-11-1 (providing that, among other things, the court is to hear evidence and find that: "(1) the adoption requested is in the best interest of the child; [and] (2) the petitioner or petitioners for adoption are of sufficient ability to rear the child and furnish suitable support and education.")

(Supplemental Tr. Vol. II, pgs. 4-5.)

- [4] After the presentation of evidence, the trial court granted Paternal Grandparents' adoption petition. Parents now appeal.

Discussion and Decision

- [5] At the outset, we note that Paternal Grandparents have not filed an appellee's brief. It is well established that our court "will not undertake the burden of developing arguments for the appellee." *In re Adoption of N.W.R.*, 971 N.E.2d 110, 112 (Ind. Ct. App. 2012). Rather, we apply a less stringent standard of review and will reverse upon a showing of prima facie error, which is error "at first sight, on first appearance, or on the face of it." *Orlich v. Orlich*, 859 N.E.2d 671, 673 (Ind. Ct. App. 2006). However, to determine whether reversal is required, we are still obligated to correctly apply the law to the facts in the record. *Jenkins v. Jenkins*, 17 N.E.3d 350, 352 (Ind. Ct. App. 2014). Here, Parents raise an issue related to the constitutionality of the trial court's judgment. We therefore review the trial court's decision de novo. *Goodson v. Carlson*, 888 N.E.2d 217, 220 (Ind. Ct. App. 2008) (reviewing de novo questions of due process).
- [6] The rights afforded by the involuntary termination statutes apply in adoption proceedings where the petitioners seek to adopt over the objections of one or both of the natural parents. *Taylor v. Scott*, 570 N.E.2d 1333, 1335 (Ind. Ct. App. 1991), *trans. denied*. Accordingly, a parent whose parental rights will be

terminated in an adoption proceeding has three rights: (1) the right to be represented by counsel; (2) the right to have counsel provided if he or she can not afford private representation; and (3) the right to be informed of the two preceding rights. *See S.R. v. M.J. (Matter of Adoption of C.J.)*, 71 N.E.3d 436, 443 (Ind. Ct. App. 2017).

[7] *In Matter of Adoption of C.J.*, as here, the trial court conducted bifurcated proceedings. One hearing addressed the necessity of consent to the adoption and the second hearing addressed best interests. The biological mother had been appointed counsel only after the petitioner had rested her case at the hearing on the mother's consent. The adoption was granted, and the biological mother appealed, alleging a deprivation of her due process rights. After observing that "a parent has a fundamental liberty interest in the care and custody of her child," the Court discussed the right to counsel in particular:

Due process safeguards preclude "state action that deprives a person of life, liberty, or property without a fair proceeding." *In re G.P.*, 4 N.E.3d 1158, 1165 (Ind. 2014) (quoting *In re C.G.*, 954 N.E.2d 910, 916 (Ind. 2011)). As our courts have previously noted, a parent has a fundamental liberty interest in the care and custody of her child. *Petition of McClure*, 549 N.E.2d 392, 395 (Ind. Ct. App. 1990). Thus, we have held it to be a violation of due process if a child is removed from "an indigent parent without affording that parent the right to assistance of court-appointed counsel." *Id.*

Indiana's law governing juvenile court procedures provides that "[a] parent is entitled to representation by counsel in proceedings to terminate the parent-child relationship." Ind. Code § 31-32-2-5. Furthermore, Indiana Code section 31-32-4-1(2) states that

“[a] parent, in a proceeding to terminate the parent-child relationship” is “entitled to be represented by counsel.” More specifically, if

(1) a parent in proceedings to terminate the parent-child relationship does not have an attorney who may represent the parent without a conflict of interest; and

(2) the parent has not lawfully waived the parent’s right to counsel under [Indiana Code chapter 31-32-5];

the juvenile court shall appoint counsel for the parent at the initial hearing or at any earlier time.

I.C. § 31-32-4-3(a).

The right to counsel in a termination proceeding may only be waived “if the parent does so knowingly and voluntarily.” I.C. § 31-32-5-5.

Id. at 442-43. The *Adoption of C.J.* Court reversed the adoption decree, concluding that the mother had “established a prima facie case that she was deprived of an essential right in violation of due process.” *Id.* at 444.

[8] Here, Parents appeared at the first evidentiary hearing, each represented by court-appointed counsel. Notwithstanding the adverse ruling on the issue of consent, neither parent expressly waived a right to representation at the second phase of the bifurcated proceedings. At the second evidentiary hearing, apparently due to scheduling conflicts on the part of both court-appointed attorneys, neither Mother nor Father was represented by counsel. Although the

trial court properly appointed counsel for Parents, after it became apparent that both attorneys were unavailable to serve in their appointed capacity, the trial court nevertheless proceeded to conduct an uncontested hearing. Ultimately, the trial court determined that Paternal Grandparents had presented clear and convincing evidence that their adoption of Children was in Children's best interests. Parents have established, prima facie, that they were deprived of an essential right in violation of due process.

Conclusion

- [9] Because Parents have demonstrated, prima facie, that they were not afforded their due process rights to legal representation in proceedings that could result in termination of parental rights, we reverse the decree of adoption.
- [10] Reversed and remanded for further proceedings.

Riley, J., and Vaidik, J., concur.