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Adoption

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In **In Re Adoption of Baby W.**, 796 N.E. 2d 364 (Ind. Ct. App. 2003), decided on September 26, 2003, the Court affirmed the trial court's dismissal of the putative father's objection to the adoption petition. The facts and several of the issues raised by the putative father were discussed in a previous Appellate opinion, **In Re Paternity of Baby W.**, 774 N.E. 2d 570 (Ind. Ct. App. 2002), in which the Court affirmed the trial court's dismissal of the paternity proceeding.

The mother became pregnant in late 2000 and decided to place the child for adoption. One week prior to the child's birth on May 12, 2001, the attorney who represented the adoptive parents contacted the putative father by telephone and sent him a letter, a denial of paternity, and waiver of notice and a pre-birth notice in virtually identical form to that prescribed at I.C. 31-19-3-4. The notice informed the putative father that he must file a paternity action within thirty days of receipt of the notice, and that failure to file and establish paternity would cause the putative father's consent to adoption to be irrevocably implied and he would lose his right to contest the adoption or establish paternity. The notice also informed the putative father that nothing the mother or anyone else said to the putative father relieved the putative father of his obligations under the notice. The attorney clearly identified his role as a legal representative of the adoptive parents. When the child was born, the child was immediately taken into custody pursuant to a "request for detention" filed by the Clay County Office of Family and Children and placed in foster care with the adoptive parents. The putative father sent three letters to the attorney for the adoptive parents after the child's birth. In the first letter the putative father wrote that paternity needed to be established before he could consent to adoption. The father did not sign and return any of the documents which the attorney had sent him. The father's second letter stated that he was not in a position to rear the child, but he wanted to meet the adoptive parents before consenting to adoption. The putative father stated that he felt an obligation to insure the child was in a good home. In a third letter the putative father requested that the adoptive parents pay for one half of the paternity testing. The putative father further said that if the adoptive parents refused to assume the cost to have the birth mother and the child tested, the father would retain his own attorney.

Paternity testing initiated five months after the child's birth revealed a 99.99% probability that the putative father was the child's biological father. The attorney for the adoptive parents wrote to the putative father on November 9, 2001, enclosing the paternity test results, a post-birth notice pursuant to I.C. 31-19-4-5, and a consent to

adoption form. On November 27, 2001, the adoptive parents filed their petition for adoption in Daviess Circuit Court. The putative father filed a motion to contest the adoption on December 3, 2001. He filed a petition to establish paternity and for custody of the child on December 12, 2001 in Clay Circuit Court.

The adoptive parents requested and were granted the right to intervene in the paternity proceeding. The adoptive parents also moved to dismiss the paternity proceeding because of the putative father's failure to timely commence a paternity action within thirty days of the receipt of the pre-birth notice. The trial court dismissed the putative father's paternity proceeding. The Court of Appeals affirmed the trial court's dismissal in In Re Paternity of Baby W., 774 N.E. 2d 570 (Ind. Ct. App. 2002). In considering the putative father's paternity appeal, the Court found that the pre-birth notice substantially complied with the statute and that the putative father's initiation of DNA testing did not entitle him to a deviation from the thirty day time limit of the statute. Id. at 578. The Court also noted that the attorney for the adoptive parents had plainly expressed in his letter to the putative father that the attorney represented the adoptive parents. Such expression served as fair notice that the attorney represented interests contrary to those of the putative father. The Court also opined that any claim that the putative father's right to be advised of his right to counsel should be raised in the adoption proceedings. Id. at 579, fn5.

On January 15, 2003 the putative father filed an objection to the petition for adoption alleging: (1) his constitutional right to counsel had been violated; (2) the waiver of his fundamental right to establish a relationship with the child was constitutionally invalid. The court dismissed the putative father's objection to the adoption petition, finding that the putative father's consent to adoption was irrevocably implied pursuant to I.C. 31-19-9-12. The putative father appealed the dismissal which was certified by the court as a final judgment pursuant to Indiana Trial Rule 54(B).

Putative father was barred by doctrines of law-of-the-case and res judicata from arguing violation of due process due to allegedly by insufficient pre-birth notice.

Two of the putative father's Appellate claims on the adoption cause had been addressed in the paternity appeal. The adoptive parents contended that the duplicative claims were barred by the doctrines of law-of-the-case and res judicata. The Court agreed with the adoptive parents' argument. The Court cited Cha v. Warnick, 476 N.E. 2d 109, 114 (Ind. 1985), stating that the law-of-the-case doctrine provides that an Appellate Court's determination of a legal issue binds both the trial court and the Appellate Court in any subsequent appeal involving the same case and substantially the same facts. Adoption of Baby W. at 372. The Court stated that the application of the law-of-the-case doctrine is discretionary, and that courts retain the power to revisit prior decisions or those of a coordinate court in any circumstance, "although as a rule courts should be loathe to do so in the absence of extraordinary circumstances." Platt v. State, 664 N.E. 2d 357, 361 (Ind. Ct. App. 1996).

The Court further stated that the doctrine of res judicata prevents the repetitious litigation of essentially the same dispute. Adoption of Baby W. at 373. Res judicata is divided into

the two branches of issue preclusion and claim preclusion. Id. Issue preclusion, also referred to as collateral estoppel, can be used offensively or defensively. Id. Offensive collateral estoppel as applied in this adoption case involves a situation where the plaintiff seeks to foreclose the defendant from litigating an issue which the defendant had previously litigated unsuccessfully in an action with another party. Eichenberger v. Eichenberger, 743 N.E. 2d 370, 374-75 (Ind. Ct. App. 2001). The prime consideration is whether the party against whom the prior judgment is pled had a full and fair opportunity to litigate the issue and whether it would be otherwise unfair under the circumstances to permit the use of collateral estoppel. Bienz v. Bloom, 674 N.E. 2d 998, 1004 (Ind. Ct. App. 1996).

The two claims from the paternity appeal which the putative father argued in the adoption appeal were: (1) the pre-birth notice was insufficient and therefore the putative father's due process rights was violated; (2) the putative father's fundamental right to establish a relationship with the child were terminated without any affirmative showing that he knowingly and voluntarily waived his rights. The Court opined that the putative father was barred by the doctrines of law-of-the-case and res judicata from relitigating the first issue and the second issued was res judicata in the adoption appeal. Adoption of Baby W., at 374.

The putative father had merely an executory interest in forming a relationship with the child that had not ripened into an interest that was entitled to substantial protection under the Due Process Clause.

The Court assumed arguendo that the putative father's argument that his due process rights were violated when his fundamental right to establish a relationship with the child was terminated had been preserved for the adoption appeal. The Court noted that the biological link between a putative father and his child alone does not warrant significant constitutional protection. Adoption of Baby W. at 374, quoting Lehr v. Robertson, 463 U.S. 248, 261-62, 103 S. Ct. 2985, 77 L. Ed. 2d 614 (1983). A putative father does have a constitutionally protected inchoate or 'opportunity interest' to form a relationship with his child. In Re Paternity of M.G.S., 765 N.E. 2d 990, 1005 (Ind. Ct. App. 2001). If the putative father grasps this opportunity by coming forward to participate in the rearing of his child, his parental rights with respect to that child ripen into an interest which is entitled to substantial protection under the Due Process Clause. Id. The Court opined that nowhere in his three letters to the adoptive parents' attorney did the putative father demonstrate an intent to rear the child or otherwise be involved in the child's life. The Court held that the putative father had not grasped his opportunity to establish a relationship with the child; therefore, his executory interest in forming a relationship with the child had not ripened into an interest that was entitled to substantial protection under the Due Process Clause. Adoption of Baby W. at 375. The adoption court did not violate the putative father's due process rights on this issue. Id.

It was the duty of the adoption court to inform the putative father of his right to counsel.

The putative father contended that he was denied due process because the attorney for the adoptive parents never informed him of his right to counsel. The Court noted that 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). The parent has three related statutory rights: (1) the right to be represented by counsel; (2) the right to have counsel provided if he could not afford private representation; and (3) the right to be informed of the two preceding rights. Id.

The Court was not persuaded by the putative father's due process argument, stating that there was no duty on the part of the adoptive parents' attorney to inform the putative father of his right to counsel. The Court noted that the letter written by the adoptive parents' attorney plainly expressed the identity of the attorney's client and that such expression served as fair notice that the adoptive parents' attorney represented interests contrary to those of the putative father. The putative father also indicated in his letter to the adoptive parents' attorney that the putative father would retain counsel to represent his own interests. The Court further opined that the adoption court had a duty to inform the putative father of his right to counsel. Adoption of Baby W. at 376. The adoption court's failure to do so was subject to the constitutional rule of harmless error, because the putative father was represented by counsel at all stages of both the adoption and paternity proceedings. Id.

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