

Children's Law Center of Indiana



Adoption

8/16/13

In **In Re Adoption of C.B.M.**, 992 N.E. 2d 687 (Ind. 2013), the Indiana Supreme Court reversed the adoption court's judgment denying Natural Mother's petition to set aside the adoption of her children (the Twins). The Court remanded with instructions to vacate the adoption decree within seven days of the Supreme Court's opinion being certified, to reset the adoption petition for a contested hearing, and to promptly serve notice and summons of that hearing on Natural Mother. The Court said that, pending the contested adoption hearing, the trial court could exercise its authority to entertain motions regarding temporary custody of the Twins under IC 31-19-2-13, until final judgment is entered. The Twins were born in June 2004, paternity was never established, and the identity of their father is unknown. In January 2006, when they were eighteen months old, the Twins were determined to be CHINS and removed from Natural Mother's home. Termination of parental rights proceedings began in July 2007, and Natural Mother's parental rights were terminated in January 2008. Natural Mother promptly appealed the termination judgment, but did not make any effort to file for a stay of the termination judgment. In early summer 2008, the Twins' foster parents petitioned to adopt them. DCS consented to the adoption, which was granted about ten weeks later. Natural Mother's termination appeal was still pending at the time the adoption was finalized. None of the parties to the adoption notified Natural Mother of the adoption proceedings, because IC 31-19-2.5-4(4) states that notice to a parent whose rights have been terminated is not required. DCS made no effort to notify the Court of Appeals, which was considering Natural Mother's termination appeal, that the adoption was pending or that DCS had consented to the adoption. Two months after the Twins' adoption was finalized, the Court of Appeals reversed the termination judgment against Natural Mother in **Moore v. Jasper Cnty. Dept. of Child Servs.**, 894 N.E. 2d 218 (Ind. Ct. App. 2008). Based on the Court of Appeals decision, Natural Mother petitioned the adoption court in January 2009 to set aside the adoption decree. Adoptive Parents promptly objected. In May 2011, Adoptive Father was killed in a traffic accident. The Court continued to refer to the Adoptive Parents in the plural for this opinion, for consistency with prior pleadings. *Id.* at 690 n.2. In December 2011, the adoption court denied Natural Mother's motion; its ruling stated that Natural Mother's constitutional rights had not been violated and that her remedy was to seek a stay of the termination judgment pending appeal under Indiana Trial Rule 62, which she had not done. On appeal, the Court of Appeals reversed the adoption court's decision at **In Re Adoption of C.B.M.**, 979 N.E. 2d 174 (Ind. Ct. App. 2012). The Indiana Supreme Court accepted transfer, thereby vacating the Court of Appeals opinion.

The Court declined to hold that Natural Mother was required to file a stay in order to preserve a meaningful appellate remedy for her parental rights. *Id.* at 693. The Attorney

General and Adoptive Parents argued that Natural Mother's termination appeal was rendered moot when the adoption was granted, and that, if she wished to preserve her rights, she should have asked the court which granted the termination petition to stay its judgment pending appeal. The Attorney General and Adoptive Parents argued that, without such a request, the Twins' need for a speedy and permanent placement trumps Natural Mother's rights. The Court could not agree with their arguments because: (1) Natural Mother's parental rights are precious and protected by our Federal and State Constitutions; and (2) apart from the importance of Natural Mother's substantive parental rights, Indiana is particularly solicitous of the right to appeal. *Id.* at 692. The Court said that it would offend Natural Mother's rights as both a mother and an appellate litigant to let her parent-child relationship with the Twins become contingent upon a "race to the courthouse", hinging on whether the adoption could be finalized before the termination appeal was complete. *Id.*

Although Adoptive Parents and the Attorney General argued that it was Natural Mother's sole responsibility to avoid such a "race" by seeking a stay of the termination judgment pending her appeal, the Court said that Court of Appeals precedent suggests otherwise. *Id.* at 693. The Court likened this case to the situation in *Cunningham v. Hiles*, 395 N.E. 2d 851, 853 (Ind. Ct. App. 1979), *modified on reh'g*, 402 N.E. 2d 17 (Ind. Ct. App. 1980), in which the trial court had refused to enjoin construction of a music store on a residential lot, but the Court of Appeals reversed. *C.B.M.* at 693. The Court said that, in *Cunningham*, the music store was built at the owner's own peril while the appeal was pending without informing the Court of Appeals of that important fact. *Cunningham* at 20-21 n.4. *C.B.M.* at 693. The *Cunningham* opinion on rehearing made clear that "*the parties* should have informed this Court of the fact that the music store had been constructed", suggesting that the "duty to place such matters before this Court by proper petitions, motions, or challenges by verified pleadings" is shared. *Cunningham* at 20 (emphasis added; internal citations, quotations, and substitutions omitted.) *C.B.M.* at 693. The Court said that, while Natural Mother certainly could have sought a stay of the termination judgment, DCS was also a party to the appeal, and unlike Natural Mother, DCS also participated in the adoption through the power to consent (or not) to the adoption. *Id.* The Court said that DCS was in a better position than Natural Mother to inform the Court of Appeals of post-judgment issues that may affect the outcome of a pending appeal as well as DCS's intent to consent to the adoption. *Id.* The Court observed that DCS had every right to rely on the trial court's termination judgment and consent to the adoption while the appeal was still pending (pursuant to IC 31-19-11-6), but such bold reliance came at its own, and the Twins' peril. *Id.*

The Court concluded that the adoption court abused its discretion by refusing to set aside the Twins' adoption. *Id.* at 695. The Court said that reversal of the termination judgment is significant because consent is ordinarily a vital part of an adoption. *Id.* at 693. The Court, citing *In Re Adoption of N.W.R.*, 971 N.E. 2d 110, 117 (Ind. Ct. App. 2012), noted that when consent is required, a defect in consent will render the adoption decree invalid, and require the adoption to be reversed and remanded. *C.B.M.* at 693. The Court observed that even though notice and consent are generally required, in some situations, the natural parent is not entitled to notice, and generally this category is based on a prior judicial finding of misconduct such as Natural Mother's termination judgment in this case. *Id.* at 694. The Court explained that, in these cases, notice is deemed unnecessary because the parent had the opportunity to contest the allegations in a prior proceeding. *Id.* The Court looked to Ind. Trial Rule 60(B)(7), which states that a

judgment may be set aside when “ a prior judgment upon which it is based has been reversed or otherwise vacated.” C.B.M. at 694. Quoting Dempsey v. Belanger, 959 N.E. 2d 861, 868 (Ind. Ct. App. 2011), *trans. denied*, the Court said that TR 60(B)(7) “applies only to related judgments where the second judgment is based upon the first judgment, and the first has been reversed or otherwise vacated.” C.B.M. at 694. The Court opined that, in this case, the adoption “is based upon” the termination judgment because if not for the preclusive effect of the prior termination judgment, the Twins’ adoption would have required notice to Natural Mother. Id. at 695. The Court said that, accordingly, Natural Mother became entitled to relief from the adoption when the termination judgment was “reversed or otherwise vacated” on appeal. Id. The Court observed that, since Natural Mother’s petition is within T.R. 60(B)(7)’s specific provisions, she need not show a “meritorious defense” as T.R. 60(B)(8) would require. Id. The Court said that, since the only judicial determination that Natural Mother is unfit to retain her parental rights had been overturned on appeal, letting the adoption stand would be an overreach of State power into family integrity; therefore, the adoption must be set aside. Id.

The Court said that, to potentially avoid the harsh effect of vacating a child’s adoption, parties always may, and sometimes ought to exceed the bare minimum of due process notice requirements. Id. at 695-96. The Court observed that, while Adoptive Parents were not required to serve notice on Natural Mother due to IC 31-19-2.5-4(2)(F), doing so voluntarily may well have saved the adoption from reversal. Id. at 695. The Court explained that, had Natural Mother been served, Adoptive Parents could then have requested a contested adoption hearing for litigating an *alternative* basis for dispensing with consent under IC 31-19-9-8(a) (emphasis in opinion). Id. at 695-96. The Court said that Natural Mother would then have been offered a “day in court” independent of the termination, giving the Court an alternative basis to affirm the adoption, because either she would have appeared and been heard, or else failed to appear and been properly defaulted. Id. at 696. The Court emphasized that such notice is not *required*, and adoptive parents have the statutory right to rely solely on a trial-level termination judgment and seek adoption pending the termination appeal, but cautioned that such reliance comes at the adoptive parents’ peril (emphasis in opinion). Id.

The Court strongly suggested that in the future, DCS’s best practice would be to leave any underlying CHINS cases open until any related termination appeal is completed. Id. at 696. The Court said that children may have a particularly great “need of services” when a termination judgment is reversed on appeal, because, by that time, they will have been removed from the parents’ home for a substantial time and will be bonding into a new home, especially when, as here, the foster parents plan to adopt. Id. The Court said that, even if they are not unfit, the natural parents may also be in need of services before the children could appropriately return to their original home. Id. The Court noted that IC 31-19-2-13 could authorize Adoptive Parents to seek temporary custody of the Twins while the adoption is pending, which may very well be beneficial to the Twins, but falls far short of the services a CHINS case would permit. Id.

The Court reiterated that granting an adoption pending termination appeal is a discretionary decision of the trial court. Id. at 696. The Court said that our Legislature has authorized the practice, and there are surely cases in which it will be entirely appropriate to expedite the adoption. Id. The Court encouraged adoption courts to exercise their authority to

grant such adoptions with an abundance of caution in view of the potentially devastating consequences of having an adoption invalidated by a termination appeal. Id.