

Children's Law Center of Indiana



Adoption

9/23/16

In **In Re Adoption of J.S.S.**, 61 N.E.3d 394 (Ind. Ct. App. 2016), the Court affirmed the trial court's decision denying Foster Parents' petition to adopt the children, and held that the trial court did not err in determining that Foster Parents failed to meet their burden of proof to show that Father's consent to the adoption was not necessary.

Two children were born to Mother and Father during their marriage. Mother was incarcerated after she had moved away with the children without telling Father their location. Father was incarcerated soon afterwards. Upon his release, Father learned that Mother and the children were somewhere in Fort Wayne, Indiana, and he moved to North Vernon, Indiana. In November 2012, Allen County DCS informed Father that the children were in DCS custody. Father appeared for the initial CHINS hearing, where the CHINS court found that Father was paying child support but had not seen the children since 2009. The CHINS court ordered supervised therapeutic visitation between Father and the children. In 2013, the CHINS court ordered that Father would have no visitation with the children, but Father regained supervised visitation with the children later in 2013. However, Father continued to delay in participating in therapeutic supervised visitation until June 2014, when the CHINS court again ordered no visitation for Father. The permanency plan changed from reunification with Father to termination of parental rights.

During the pendency of the CHINS petition, Foster Parents petitioned to adopt the children. Mother consented, but Father objected. After a contested hearing, the trial court determined that Foster Parents had failed to establish by clear and convincing evidence that Father's consent was not necessary. Foster Parents appealed.

Foster Parents were required to show by clear and convincing evidence that Father's consent was not required under IC 31-19-9-8(a). Id. at 397. IC 31-19-9-8(a) provides that a parent's consent to an adoption is not required if the child is in the custody of another person if for at least one 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." Id. Since Father had regularly paid child support for the children, Foster Parents alleged and needed to prove by clear and convincing evidence that Father's consent was not needed because of his failure to communicate with the children when able to do so. Id.

The Court determined that In Re O.R., 16 N.E.3d 965 (Ind. 2014) was not as broad an opinion as Foster Parents argued. Id. at 398. While Foster Parents conceded that Father could not communicate with the children when there were court orders in place preventing contact,

they argued that Father could have had visitation with the children if he had acted in a more timely manner to contact the children's therapist. Id. at 397. Foster Parents cited In Re O.R., 16 N.E.3d 965 (Ind. 2014), where the incarcerated father claimed that he had justifiable cause for failing to communicate with his child because the foster parents did not bring the child to the prison for visitation. O.R. at 974. After the protective order between the father and the child expired, the father still did not pursue communication with the child via any means. Id. The O.R. Court concluded that this demonstrated that the father was not unable to communicate with the child, only that he chose not to do so. Id. Foster Parents argued that this case meant that they could be relieved of their obligation to show that Father was able to communicate with the children and failed to do so, because other than his single, late contact with the therapist, he had no contact with the children. Id. at 398. The Court disagreed with this broad interpretation of O.R., and noted that the O.R. Court had determined that the foster parents had presented sufficient evidence to carry their burden of showing that the father's consent was unneeded. Id. The Court noted that their analysis was not whether a parent acted with reasonable promptness in attempting to contact a child, but rather, where the adoption petitioners carried their burden of proof in showing that a parent failed to communicate with a child when able to do so. Id. at 398-99.

The Court found that evidence must favorable to the trial court's determination showed that Father had never gained the ability to contact the children, which supported the trial court's decision that Foster Parents had not met their burden of proof. Id. at 398. The Court noted that it would not disturb the trial court's ruling unless the evidence led to a contrary conclusion from what the trial court reached. Id. The Court noted the following evidence: (1) Father did not know where the children were living until DCS contacted him; (2) Father was not provided access to the children through the CHINS case; (3) Father's potential route to visitation was dependent on the therapist's recommendation, which was not in Father's favor; and (4) the DCS caseworker testified that she did not believe that a referral for visitation was ever made for Father. Id. Since the Court's review was limited to whether there was any evidence to support the trial court's determination that Foster Parents failed to establish that Father had the ability to communicate with the children and then failed to do so, the Court found that the evidence supported the trial court's determination. Id. The Court opined that Father never gained the ability to contact the children, and the trial court's decision that Foster Parents had not met their burden of proof was supported by the evidence. Id.