

Children's Law Center of Indiana



Adoption

12/16/10

In ***In Re Adoption of L.D.***, 938 N.E.2d 666 (Ind. 2010), the Court remanded the case to the trial court with directions to grant Mother's Trial Rule 60(B) motion, thereby vacating the child's adoption. Mother was unmarried and incarcerated when she gave birth to the child on March 1, 2003. Mother's co-worker was appointed the child's guardian. (Coworker adopted Mother in 2005, thereby becoming the child's Adoptive Maternal Grandmother.) Paternity was established for the child in a court proceeding, and Father's adoptive parents (Paternal Grandparents) petitioned to adopt the child in August 2003. They mailed notices of the petition to Adoptive Maternal Grandmother and to Mother. In December 2004, Mother, Father, Adoptive Maternal Grandmother, Paternal Grandparents, and the child's Guardian ad Litem reached an agreement in which the court (1) dissolved Adoptive Maternal Grandmother's guardianship of the child; (2) awarded joint legal custody to Paternal Grandparents and Mother; (3) awarded physical custody to Paternal Grandparents; and (4) provided parenting time to Mother supervised by Adoptive Maternal Grandmother and parenting time to Adoptive Maternal Grandmother individually. In June 2006, Father, Adoptive Maternal Grandmother, and Paternal Grandparents agreed to modify the December 2004 court order. At their request, the court terminated Mother's visitation with the child pending a hearing to determine her fitness to have contact with the child and granted Adoptive Maternal Grandmother non-custodial parenting time. The court's order recited that all of the parties believed that Mother had actual notice of the hearing but failed to appear.

Mother was incarcerated from September 21, 2006, to July 17, 2007, and from September 21, 2007, to December 20, 2007. In August 2007, Paternal Grandparents filed a new petition to adopt the child. Unlike their first adoption petition, Paternal Grandparents and their lawyer did not give Adoptive Maternal Grandmother any notice. Paternal Grandparents filed an affidavit saying that they did not have Mother's address or telephone number; that they had inquired with the Indiana Department of Correction and the Marion County Jail and learned that Mother was not incarcerated; and that Mother had not contacted the child since August 2005. They also filed "proof of service" of the adoption petition by publication. Father was given notice of the petition and consented to the adoption. On January 31, 2008, Paternal Grandparents dropped off the child with Adoptive Maternal Grandmother for parenting time, but did not tell her that they would be attending the adoption hearing. The brief adoption hearing before the judge *pro tempore* included no reference or inquiry as to Mother or her absence. The judge granted the

Paternal Grandparents' adoption petition after some questioning as to their desire and fitness to adopt. Paternal Grandparents informed Adoptive Maternal Grandmother of the adoption when they picked up the child and that they would soon be asking the court to terminate Adoptive Maternal Grandmother's parenting time.

Within two weeks, on February 13, 2008, Mother and Adoptive Maternal Grandmother jointly asked the court to vacate the adoption. They contended that under Trial Rule 60(B), they were entitled to relief from the court's adoption because they had not been given the notice required by law. At a hearing on the motion in August 2008, Paternal Grandmother testified that two days before the adoption petition was filed, she had asked Adoptive Maternal Grandmother "if she knew how to contact" Mother, and that Adoptive Maternal Grandmother replied, "[N]o, not really." Adoptive Maternal Grandmother testified that she did not recall such a conversation and at all times had been able to contact Mother if needed. The trial court denied the Trial Rule 60(B) request on June 10, 2009, holding that Adoptive Maternal Grandmother was not entitled to notice and that notice by publication had been adequate with respect to Mother. Mother and Adoptive Maternal Grandmother appealed the denial of their Motion to Set Aside the Decree under T.R. 60(B). The Court of Appeals held that Mother had been adequately served; therefore, her motion had been properly denied. In Re Adoption of L.D., 921 N.E.2d 867, 874-76 (Ind. Ct. App. 2010). The Indiana Supreme Court granted transfer, thereby vacating the Court of Appeals opinion.

The Court concluded that because Paternal Grandparents and their counsel failed to perform the diligent search for Mother required by the Due Process Clause, notice and service by publication was insufficient to confer personal jurisdiction over Mother. Id. at 671. The Court said that the dispositive issue in this appeal is whether Mother received the notice required by law that a case had been filed in court seeking the adoption of the child. Id. at 669. The Court opined that, if the notice was not adequate, Mother's T.R. 60(B) motion to set aside the adoption should have been granted for the reason that the adoption would have been void for want of personal jurisdiction. L.D. at 669, quoting Stidham v. Welch, 698 N.E.2d 1152, 1155 n.3 (Ind. 1998). The Court observed that both Indiana's adoption statute and Trial Rules set forth certain standards for notice and service of process that are applicable in adoption cases, but these rules operate under the Due Process Clause of the Fourteenth Amendment. L.D. at 669. Notice and service of process that may technically comply with a state statute or the Trial Rules does not necessarily comport with due process. Id. The Court said that the adoption statute and the Trial Rules provide the mechanism of notice or service of process by publication, but the Due Process Clause demands a diligent search before attempting notice by publication. Id.

The Court noted that case law makes clear that service by publication is inadequate when a diligent effort has not been made to ascertain a party's whereabouts. Id. Among the cases cited by the Court were Smith v. Tisdal, 484 N.E.2d 42, 44 (Ind. Ct. App. 1995) (notice of adoption given by publication in an Indiana newspaper when mother was a resident of Alaska was held

insufficient) and In Re Adoption of D.C., 887 N.E.2d 950, 957-58 (Ind. Ct. App. 2008) (there was not a diligent search where a simple inquiry would have uncovered Mother's address). L.D. at 669-70. The Court observed that, where service by publication adequate has been found to confer jurisdiction, it has only been upon an adequate showing of diligent search. Id. at 670. The Court cited, inter alia, D.L.D. v. L.D., 911 N.E.2d 675, 679 (Ind. Ct. App. 2009), trans. denied (wife had attempted to serve husband by mail at his last known address, had tried to locate him at homes of his best friend and mother, and had enlisted help of the local prosecutor's office, all prior to seeking service by publication; Court found adequate showing of due diligence) and Bays v. Bays, 489 N.E.2d 555, 557 (Ind. Ct. App. 1986), trans. denied (father had attempted to locate mother by contacting her parents several times over the course of three years and by employing a private investigator, all prior to publishing notice; Court found these efforts constituted diligent search). L.D. at 670. The Court commented that Paternal Grandparents, who had previously successfully given notice to Mother at Adoptive Maternal Grandmother's address made no attempt to do so here, they made only the most obtuse and ambiguous attempt to ask Adoptive Maternal Grandmother about Mother's whereabouts, and they affirmatively concealed from Adoptive Maternal Grandmother the very fact that they were filing an adoption petition. Id. at 671. The Court said, "[o]ne need look no further than the fact that [Adoptive Maternal Grandmother and Mother] filed their motion in court less than two weeks after Paternal Grandparents told [Adoptive Maternal Grandmother] that the adoption had been granted to see how little effort would have been required for Paternal Grandparents to find Mother had they involved [Adoptive Maternal Grandmother]." Id.