

Children's Law Center of Indiana



Adoption

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In ***In Re Adoption of S.W.***, 979 N.E.2d 633 (Ind. Ct. App. 2012), the Court affirmed the trial court's order granting Maternal Grandparents' petition for adoption without Father's consent. The child was born in 2000 and Father executed an affidavit establishing his paternity of the child. Mother was incarcerated approximately four months after the child's birth and remained incarcerated until 2005, when the child was five years old. Upon Mother's incarceration, the child was entrusted to the care of Maternal Grandparents, who were appointed as legal guardians of the child in May 2001. A support order obliging Father to support the child was never entered, and Father never provided financial support for the child to Maternal Grandparents. Like Mother, Father used alcohol and illicit drugs, including cocaine, oxycodone, and marijuana, on a regular basis. Maternal Grandparents attempted to maintain a relationship between the child and Father, including: (1) arranging for Father to visit the child at their home; (2) on a few occasions driving the child to Paternal Grandparents' home to visit Father; and (3) arranging for Father to pick up the child for visitation between 2000 and 2002, but Father failed to show up, explaining that he was "too high" to visit the child. Father's failure to show up for these scheduled visits upset the child. Father never contacted Maternal Grandparents after 2002 to arrange further visitation. Mother was released from incarceration in 2005, and Maternal Grandmother let the child stay with Mother for approximately three months. During this time, Father stayed with Mother occasionally.

In 2006, Father was incarcerated due to his conviction for Class B felony burglary of the home of his own grandfather. In 2007, Father was sentenced to twenty years executed, with a projected release date of September 14, 2016, at which time the child will be sixteen years old. In 2010 Maternal Grandparents again attempted to foster a relationship between the child and Father by purchasing Thanksgiving, Christmas, and Father's Day cards, which were signed by the child and sent to Father in prison. Maternal Grandparents gave Paternal Grandmother the child's identification documents so the child could visit Father in prison, but Father's family never contacted Maternal Grandparents to arrange to take the child to see Father in prison. In 2010 and 2011, Paternal Grandparents did visit with the child a few times. After one of these visits, the child informed Maternal Grandparents that she did not feel comfortable during these visits, referring to vulgar, inappropriate comments made by her paternal half-brother. Paternal Grandmother stated that she was too physically ill to visit the child frequently.

Mother died on February 16, 2011. On April 7, 2011, Maternal Grandparents filed their petition to adopt the child, alleging that Father's consent was not required because: (1) he had unjustifiably failed to communicate with the child for a period of one year even though he was

able to do so; (2) he had failed to support the child; (3) he was unfit to parent; and (4) he had abandoned the child prior to his incarceration. Father filed a motion to contest the adoption on April 19, 2011. The trial court appointed the county public defender to represent Father. Father was transported from the Department of Correction to be present in person for the evidentiary hearing on the petition for adoption, which was held on January 12, 2012. On January 17, 2012, the trial court issued findings of fact and conclusions of law granting Maternal Grandparents' petition to adopt the child. The trial court found, inter alia, that Father had failed without justifiable cause to communicate significantly with the child for a period of at least one year when he was not incarcerated and that Father is unfit to parent the child, whose best interests are served by dispensing with Father's consent. Father appealed, arguing that the trial court erred in granting the adoption despite his objection and lack of consent.

The Court held that Maternal Grandparents had the burden of proving their petition for adoption without Father's consent by "clear and convincing evidence." *Id.* at 640. The Court said that parental consent to adoption is generally required in Indiana. *Id.* at 639. The Court also quoted from IC 31-19-9-8(a), which provides for situations when consent to adoption is not required. *Id.* Among these provisions are that consent to adoption is not required from: (1) a parent who is adjudged to have abandoned or deserted a child for at least six months immediately preceding the date of the filing of the adoption petition; (2) a parent of a child in the custody of another person if for a period of at least one year the parent fails without justifiable cause to communicate significantly with the child when able to do so; or knowingly fails to provide for the care and support of the child when able to do so as required by law or judicial decree; and (3) a parent when the petitioner for adoption proves by clear and convincing evidence that the parent is unfit to be a parent and the best interests of the child would be served if the court dispensed with the parent's consent. *Id.* The Court also noted IC 31-19-9-8(b), which provides that "[i]f a parent has made only token efforts to support or to communicate with the child the court may declare the child abandoned by the parent." *Id.* at 640. The Court also said that the provisions of IC 31-19-9-8 are disjunctive, and any one provides independent grounds for dispensing with parental consent. *Id.*, citing *In Re Adoption of D.C.*, 928 N.E.2d 602, 606 (Ind. Ct. App. 2010) and *In Re Adoption of T.W.*, 859 N.E.2d 1215, 1218 (Ind. Ct. App. 2006), *trans. denied*. Father claimed that Maternal Grandparents had the burden of proving the elements of IC 31-19-9-8(a)(2) by "clear, cogent, and indubitable evidence." The Court disagreed, observing that in *In Re Adoption of M.A.S.*, 815 N.E.2d 216, 219-20 (Ind. Ct. App. 2004), the Court had examined the applicable law and held that the burden of proof for an adoption without consent, under any of the subsections in IC 31-19-9-8, is that of "clear and convincing evidence." *S.W.* at 640.

The Court could not say that the trial court clearly erred in finding that Father failed to communicate significantly with the child for a period of one year even though he was able to do so, which was sufficient to establish that Father's consent was not required. *Id.* at 641. The Court said that Maternal Grandparents were not required to prove that Father had *no* communication with the child, but they had to prove that he, for a period of one year, "fail[ed] without justifiable cause to communicate *significantly* with the child when able to do so" (emphasis added in opinion). *Id.* at 640. The Court noted the following evidence in support of the trial court's determination: (1) Father had only a few visits with the child and failed to appear for several scheduled visits with the child; (2) Father had no contact at all with the child from 2002

until Mother was released from prison in 2005; (3) after his incarceration in 2006, Father had little communication with the child despite Maternal Grandparents; willingness to let the child visit Father in prison. Id. at 640-41. The Court was not persuaded by Father's claim that Maternal Grandparents failed to prove that he was able to communicate with the child and Father's assertion that his lack of communication was "likely" due to Maternal Grandparents' frequent and sometimes lengthy trips at Arizona. Id. The Court said that it is true that there was evidence that Maternal Grandparents visited Arizona quite often and even moved there for approximately three years beginning in 2004. Id. The Court observed that: (1) there is no evidence that Maternal Grandparents hid the child from Father or his family; (2) in this "communication age", moving to another state does not make frequent communication with one's child unduly burdensome or impossible; (3) Father had no communication with the child from some time in 2002 until 2004 while the child was living in Kokomo. Id. at 641-42.

The Court noted that Father made no argument that the trial court's findings and conclusion are clearly erroneous with regard to his fitness as a parent IC 31-19-9-8(a)(11). Id. at 642 n.8. The Court said that this subsection is a separate ground for not requiring Father's consent to adoption. Id. The Court opined that, due to Father's lack of argument as to the unfitness ground, the Court would not reverse the judgment of the trial court even if the findings and conclusions on Father's failure to significantly communicate were clearly erroneous. Id.

The Court could not say that the trial court clearly erred by failing to consider Paternal Grandmother's visits with the child as significant communication by Father. Id. at 641. Father claimed that Paternal Grandmother had "significant and frequent" visits with the child, and referred to Paternal Grandmother's testimony to support his claim. The Court, citing In Re Adoption of Thomas, 431 N.E.2d 506, 515 (Ind. Ct. App. 1982), said that it has been held that visitation by paternal family members may constitute indirect communication by a non-custodial father. S.W. at 641. The Court noted there was evidence that Paternal Grandmother had some visits with the child, but the visits were stopped by Maternal Grandparents after the child stated she was uncomfortable with sexually suggestive talk by her paternal half-brother. Id. The Court noted that Paternal Grandmother never followed through with the plan to take the child to visit Father in prison. Id. The Court observed that on appeal, the Court must consider only the facts favoring the trial court's decision. Id.