

Children's Law Center of Indiana



Adoption

10/17/16

In K.S. v. D.S., 64 N.E.3d 1209 (Ind. Ct. App. 2016), an adoption case, the Court affirmed the trial court's decree which granted Stepmother's (Adoptive Mother's) petition for adoption of Birth Mother's child. Id. at 1218. The Court remanded for a determination of reasonable appellate attorney fees. Id. Father and Birth Mother were married, and the child was born in 2011. Father and Birth Mother were divorced in November 2014, at which time Father was awarded sole legal and physical custody of the child. When the child began living in Father's custody, the child's weight was below what it should have been for his age and he was not verbal. Father and Adoptive Mother were living together at that time, and they married about one month later. Adoptive Mother took an active role in caring for the child and arranging services for him, including counseling, speech therapy, medical care, and preschool. The child formed a close bond with Adoptive Mother. After Father took custody of the child, Birth Mother exercised visitation for a few months, but despite being given multiple opportunities, had not seen him since March, 2015. Birth Mother also failed to pay child support. In September 2015, the dissolution court suspended Birth Mother's visitation, and ordered her to complete drug treatment and a hair follicle test before visitation would be reinstated. Birth Mother failed to complete these requirements.

On November 18, 2015, Adoptive Mother filed a petition to adopt the child, to which Father's consent was attached. Adoptive Mother's petition alleged that Birth Mother had abandoned the child for a period of at least six months prior to the filing of the petition and that Birth Mother had not consistently paid child support. Birth Mother filed a response and objection to the petition on November 25, 2015, and the trial court scheduled a hearing on January 8, 2016. Birth Mother filed a request for a continuance on December 17, 2015, in which her attorney represented that Birth Mother had entered an inpatient drug treatment facility in California on December 1, 2015 and would be there for at least ninety days. In response to this motion, the trial court converted the adoption hearing to a status hearing and instructed Birth Mother's attorney to bring proof of Birth Mother's enrollment in treatment to the hearing. On January 5, 2016, Birth Mother's attorney filed a notice stating that Birth Mother had been in treatment since December 1, 2015. Attached to the notice was a letter from Nationwide Recovery in California dated November 29, 2015 stating that Birth Mother would be attending drug treatment beginning December 1, 2015 and that treatment would last between forty-five and ninety days. Birth Mother did not appear at the January 8, 2016 hearing, but her attorney appeared on her behalf and indicated that he had lost contact with Mother and did not know her whereabouts. The trial court agreed to reschedule the adoption hearing, and Birth Mother's attorney requested that the hearing be set "sooner rather than later." The trial court suggested a hearing date of January 13, 2015, and Birth Mother's attorney agreed to the date.

Birth Mother failed to appear at the January 13 hearing, and her attorney requested another continuance because he had been unable to locate her, despite making telephone calls to Nationwide Recovery. Adoptive Mother's attorney objected to the continuance and voiced concerns about the authenticity of the Nationwide Recovery letter. The trial court denied the requested continuance and held the adoption hearing. At the conclusion of the evidence, the court ruled that Birth Mother's consent to the adoption was implied pursuant to IC 31-19-9-18 due to her failure to appear to contest the petition. The trial court also concluded that Birth Mother's consent was not required pursuant to IC 31-19-9-8 because she had abandoned the child for at least six months prior to the filing of the petition. The trial court found the adoption was in the child's best interest and granted the adoption petition. Birth Mother appealed.

The Court could not conclude that Birth Mother had established good cause for her requested continuance. *Id.* at 1213. The Court found that Birth Mother had failed to cite the applicable standard of review or any authority in support of her contention that the trial court erred in denying her motion for continuance. *Id.* at 1212. Quoting *Zoller v. Zoller*, 858 N.E.2d 124, 127 (Ind. Ct. App. 2006), the Court noted, "[a] party waives any issue for which it fails to develop a cogent argument or support with adequate citation to authority." *K.S.* at 1212. The Court found Birth Mother's argument that the trial court erred in denying her motion for continuance was waived. *Id.* Waiver notwithstanding, the Court noted: (1) Birth Mother was well aware of the adoption proceeding, as her attorney had filed an appearance and objection on her behalf; (2) Birth Mother failed to appear for two scheduled hearings or maintain contact with her attorney; (3) Birth Mother's attorney did not know her location or how to reach her. *Id.*

The Court found Birth Mother's challenges to the trial court's findings that her consent to the adoption was both irrevocably waived and not required were waived due to lack of cogency, but addressed her arguments in the interests of justice. *Id.* at 1213.

The Court opined the trial court's finding that Birth Mother's consent to the adoption was irrevocably implied due to her failure to appear and prosecute her motion to contest the adoption was clearly supported by the evidence. *Id.* at 1214. The Court looked to IC 31-19-9-18, which provides that the consent of a person who had been served with notice of an adoption petition is irrevocably implied if the person files a motion to contest the adoption, but then fails to appear at the hearing to contest the adoption and fails to prosecute the motion without unreasonable delay. *Id.* In support of its opinion, the Court noted the following: (1) Birth Mother's attorney made every effort to personally notify her of the hearings, but her disappearance made it impossible for him to do so; (2) Birth Mother could not short-circuit the adoption proceedings by vanishing; (3) the trial court was not obligated to accept Birth Mother's claim that she was in drug treatment as true, particularly in light of her disappearance and her attorney's inability to reach her or anyone else at the facility where she claimed to be enrolled; (4) even if Birth Mother was in drug treatment, that would not excuse her complete failure to maintain contact with the court or her attorney about the status of the adoption proceedings of which she was undoubtedly aware. *Id.*

The Court opined the trial court’s finding that Birth Mother abandoned the child was clearly supported by the evidence. Id. at 1215. The Court looked to IC 31-19-9-8(a)(1), which provides that “[i]f a parent has made only token efforts to support or communicate with the child, the court may declare the child abandoned by the parent.” K.S. at 1215. The Court noted the trial court’s finding that Birth Mother’s consent to the adoption was not required because she had abandoned the child for at least six months immediately preceding the date the adoption petition was filed. Id. at 1214. Birth Mother argued the trial court’s finding was erroneous, but the Court found that she did not provide adequate citation to the record in support of her claim. Id. The Court listed the following evidence which supported the trial court’s finding: (1) it was undisputed that Birth Mother had not visited the child since March 2015; (2) according to Father, Birth Mother stopped showing up for visits, and when he contacted her to see if she was coming to visit, he received no response; (3) after March 2015, Birth Mother never requested visitation, and the dissolution court suspended her visitation in September 2015; (4) Birth Mother texted Father in November 2015 asking to talk to the child on the phone, but Father did not allow the telephone call because he believed the dissolution court order prohibited Mother from having contact with the child; (5) Adoptive Mother testified that Birth Mother had sent a card to the child in December 2015, but there was no support in the record for Birth Mother’s assertion that Father and Adoptive Mother prevented the child from receiving it. Id. at 1214-15. The Court held that Birth Mother’s “meager and belated” efforts to contact the child did not undermine the trial court’s finding that she had abandoned the child for the purpose of the adoption statutes. Id. at 1215.

The Court exercised its discretion to award Adoptive Mother appellate attorney fees pursuant to Ind. Appellate Rule 66(E). Id. at 1218. On cross-appeal, Adoptive Mother requested an award of appellate attorney fees, generally focusing on allegations of procedural bad faith in Birth Mother’s appellate brief. The Court noted: (1) there were numerous violations of appellate rules in Birth Mother’s Appellant’s brief. Id. at 1216. The Court found the most egregious violations in the Statement of Facts and the Argument sections of the brief. Id. The Court noted: (1) the Statement contained numerous assertions that were unsupported by the record; (2) the Statement cited facts unfavorable to the trial court’s judgment and therefore not in accordance with the applicable standard of review (which is that the trial court’s ruling on an adoption petition will not be disturbed unless the evidence leads to but one conclusion and the trial court reached the opposite conclusion); (3) the Statement contained a number of argumentative statements, contrary to the requirement that the Statement should be devoid of argument, citing Minix v. Canarecci, 956 N.E.2d 62, 66 n.2 (Ind. Ct. App. 2011). K.S. at 1216.

The Court found the Argument section of Birth Mother’s brief was the most problematic. Id. at 1217. The Court noted: (1) the Argument section of Birth Mother’s brief failed to cite to any authority in support of Birth Mother’s argument that the trial court erred in denying her motion for continuance; (2) although the brief cited two statutes in support of the argument that the trial court erred in concluding Birth Mother’s consent to adoption was both irrevocably implied and not required, the statutes were clearly conflated and misunderstood; (3) many of the assertions were not supported by citation to the record, and some were premised on misrepresentations and mischaracterizations of the record. Id. The Court found that Birth Mother’s attorney had tendered

a brief that was well below the minimum standards of competent appellate advocacy, which forced Adoptive Mother's attorney and the Court to devote inordinate time and effort in an attempt to understand and respond to Birth Mother's arguments. Id. at 1218. The Court remanded for a determination of reasonable appellate attorney fees. Id.