

Children's Law Center of Indiana



Adoption

5/4/17

In L.G. v. S.L., 76 N.E.3d 157 (Ind. Ct. App. 2017), an adoption case, the Court reversed the trial court's order dismissing Father's motion to contest the adoption, and held that Father's consent to the adoption could not be implied. Id. at 177. The Court directed the trial court to set aside the adoption decree within seven days of the certification of its opinion. Id. The Court also recommended that the trial judge recuse himself from the proceeding on remand. Id. Father, who is from Senegal, moved to New Jersey in September 2008 to attend school. Father met Mother, they lived together in Indianapolis and in Pennsylvania, and they had a daughter together. In August 2014, Father enrolled in Robert Morris University near Pittsburgh, Pennsylvania. Father continued to visit Mother and their daughter on weekends and during school breaks. Mother became pregnant again, and told Father in the fall of 2015 that she intended to place the unborn child for adoption. On October 23, 2015, prior to the child's birth, Father filed a petition to establish paternity in Marion County. The child was born on November 7, 2015. When Mother told Father about the child's birth and pending adoption, Father wrote what Adoptive Parents characterized as a "suicide letter" which Father gave to the administrators at his college and directed that it be sent to Mother. Father was admitted to a hospital for a mental health evaluation. Adoptive Parents filed their petition to adopt the child in Hamilton Superior Court on November 9, 2015. Adoptive Parents alleged that Father's consent to the adoption was not needed under IC 31-19-9-12 because Father was "unfit to be a parent." The Hamilton Superior Court consolidated the Marion County paternity case with the adoption case and awarded temporary custody of the child to Adoptive Parents.

On November 19, Father filed a motion to dismiss the adoption petition, and on November 30, Father timely filed his motion to contest the adoption. On December 15, the trial court held a hearing on Father's motion to dismiss and denied the motion. The court granted the parties until January 11, 2016 to respond to discovery requests and ordered Father to immediately review authorizations permitting Adoptive Parents to obtain his mental health records and to determine if he had any objections to the requests. On January 11, 2016, Father submitted his responses to Adoptive Parents' thirty-four interrogatories and forty-four requests for production of documents, which included more than 2,000 pages of documents. Father objected to Adoptive Parents' requests for documentation regarding his health, including his mental health, on the grounds of physician-patient privilege protected by HIPAA and by Indiana statutes. On January 15, Father moved to quash subpoenas to nonparties that Adoptive Parents had submitted in an effort to obtain information, including his mental health records. On February 1, Adoptive Parents filed a motion to compel discovery. Following a telephonic hearing on February 29, the trial court entered an order denying Father's motion to quash the subpoenas, granting Adoptive Parents' motion to compel discover, setting a hearing on Father's petition for revocation of

temporary custody and for parenting time on April 25, and setting a discovery deadline of April 18. The court ordered Father to sign authorizations for release of his medical, mental health, school, and employment records.

On March 15, Father filed a motion to continue the evidentiary hearing on his motion to contest the adoption on the grounds that the discovery deadline of April 18 did not provide sufficient time to prepare for the hearing. After a hearing, the court issued an order granting Father's motion for a hearing on release of his mental health records and deemed Adoptive Parents' motion to compel filed on February 1 as a Petition for Release of Mental Health Records pursuant to IC 16-39-3-3. The court scheduled the hearing on the release of Father's mental health records on April 11. On March 28, Father filed his motion for a finding of paternity, to which he attached a copy of the paternity DNA test results that appeared to show he is the child's biological father. Father also filed a motion for an interpreter under IC 34-45-1-1 because his native language is French, he could not afford an interpreter, and Adoptive Parents' attorney had claimed to have difficulties understanding Father. On April 11, the court heard argument on Father's request for an interpreter and denied it, finding it "groundless and frivolous" and that it was "filed so as to cause delay." The court clarified that although the court was to decide whether Father's records were to be disclosed, Father had to provide authorizations so as not to delay the proceedings. The court ordered Father's mental health records released and granted Father's motion to continue the evidentiary hearing on his motion to contest the adoption that had been previously set on April 25. The court did not reschedule the hearing on Father's motion to contest the adoption.

On April 11, Adoptive Parents filed their Supplement to Motion for Sanction of Dismissal Under Trial Rule 37 and IC 31-19-10-1.2(g) for Failure to Prosecute the motion to contest the adoption. The parties agreed and the court ordered that Adoptive Parents would take Father's deposition "on or before April 18, 2016, and/or by agreement of the parties." The day following the court's order, Father's attorney attempted to transmit Father's mental health records by facsimile, but the transmission was terminated by the receiving party. On April 13, Father provided signed authorizations to Adoptive Parents for release of his mental health records. Father's deposition was scheduled for the morning of April 18. On the evening of April 17, Father contacted his attorney to inform her that he was having transportation problems and could not travel from Pittsburgh to Indianapolis in time for the deposition. Father's attorney contacted Adoptive Parents' attorney and requested that Father be deposed over the telephone, a later time on April 18, or at any other time. Adoptive Parents' attorney refused to conduct the deposition via telephone or at any other time. After Father did not appear for the April 18 deposition, Father's attorney filed a motion to withdraw her appearance, which the court granted. At a hearing on April 22, Father appeared by telephone and requested the appointment of new counsel, which the court granted. Father's new attorney moved for a continuance, which the court granted. The court set a hearing on May 10 to address Adoptive Parents' motion to dismiss Father's motion to contest the adoption and ordered Father to show cause why his motion to contest the adoption should not be dismissed for failure to comply with discovery orders. Father appeared in person and by counsel at the hearing on May 10, and testified regarding his participation in the discovery process and his failure to appear for his deposition. On June 13, the court entered an

order dismissing Father's motion to contest the adoption with prejudice and concluding that his consent to the adoption was implied by statute. The court's order included findings and conclusions that: Father's course of frivolous objections to the production of his mental health records was designed to impede the ability of Adoptive Parents to try the case on April 25, 2016; Father failed, without justification, to appear for his deposition; Father had not shown good cause why his motion to contest the adoption should not be dismissed for failure to appear at the deposition, failure to appear at the April 22 hearing, and failure to provide complete discovery. The court found that Father had failed to prosecute his motion to contest the adoption and that IC 31-19-9-12(2) provides that a putative father's consent to adoption is irrevocably implied without further court action if he fails to appear at the hearing to contest the adoption. The court granted the adoption on July 20, 2016.

The trial court's conclusion that dismissal of Father's motion to contest adoption was warranted because of Father's failure to provide complete discovery of his mental health records without undue delay was not supported by the evidence and was clearly erroneous. *Id.* at 170. On the issue of his failure to timely provide complete discovery, Father asserted that Adoptive Parents were responsible for the delay in obtaining his mental health records because they did not comply with filing a petition for release of his records pursuant to IC 16-39-3-3. Father argued that the trial court erred when it attributed the delay to Father and dismissed his motion to contest the adoption on that basis. The Court agreed with Father's argument. *Id.* at 168. Quoting *Williams v. State*, 819 N.E.2d 381, 385 (Ind. Ct. App. 2004), *trans. denied*, the Court explained that "[d]iscovery of mental health records [is] subject to the particularized requirements" of IC 16-39-2 and -3. *L.G.* at 168-69. The Court noted IC 16-39-2-2 provides that a patient's mental health record is confidential and shall be disclosed only with the consent of the patient unless otherwise provided in IC 16-39-2 and -3. *Id.* at 169. The Court also noted that, in his discovery responses on January 11, Father objected to the unqualified release of his mental health records, so Adoptive Parents were required to: (1) petition for release of the records (IC 16-39-3-3(2)); and (2) provide notice to Father and the mental health providers of a hearing on that petition (IC 16-39-3-4). *Id.* The trial court was then required to hold a confidential hearing (IC 16-39-3-6) and make findings pursuant to IC 16-39-3-7 that: (1) other reasonable methods of obtaining the information were not available or would not be effective; (2) the need for disclosure outweighed the potential harm to the patient. *Id.* The Court observed that Adoptive Parents never filed the petition required by IC 16-39-3-3(2), but instead the trial court "deemed" Adoptive Parents' motion to compel to be a petition for Father's mental health records under IC 16-39-3-3 and set a hearing for April 11. The Court found the delay until April 11 was due to Adoptive Parents' noncompliance with the Indiana Code and was wholly attributable to them. *Id.* The Court explained that Father was entitled to object to Adoptive Parents' demands for the unqualified release of his mental health records until they had filed a petition and requested a hearing in compliance with Indiana law. *Id.* at 170. The Court said Father's objections "were based upon the unambiguous command of the statute enacted by our legislature and supported by precedent", citing *Buford v. Flori Roberts, Inc.*, 663 N.E.2d 1159, 1161 (Ind. Ct. App. 1996). *L.G.* at 170.

The trial court erred when it based its dismissal of Father’s motion to contest the adoption on Father’s failure to appear in person at the April 22 motions hearing. *Id.* at 171. The trial court concluded that: (1) Father failed, without justifiable cause, to appear in court on April 22, 2016, despite being ordered to appear personally, and (2) IC 31-19-9-12(2) provides that putative father’s consent to adoption is irrevocably implied without further court action if the putative father “having filed a motion to contest the adoption in accordance with IC 31-19-10, fails to appear at the hearing set to contest the adoption.” *Id.* at 170. The Court concluded the trial court’s judgment on this issue was clearly erroneous. *Id.* The Court noted that: (1) the April 22 hearing was *not* the hearing set to contest the adoption; therefore, IC 31-19-9-12(2) was inapplicable; (2) Father called the court and appeared by telephone; (3) Father moved to continue the hearing and requested that the court appoint new counsel to represent him; (4) Father was entitled to counsel in this proceeding (*In Re G.W.B.*, 776 N.E.2d 952, 954 (Ind. Ct. App. 2002)); (5) the court granted Father’s request for counsel an motion or continuance (emphasis in opinion). *Id.* at 170-71.

The Court reversed the trial court’s order dismissing Father’s motion to contest the adoption and remanded with instructions for the court to hold on evidentiary hearing on the motion. *Id.* at 174. Father maintained that dismissal for failure to appear at his first scheduled deposition on April 18, 2016, was unjust, and the Court agreed with Father. *Id.* at 171. The Court noted: (1) Father lived approximately five and one half hours away from Indianapolis, did not own an automobile, and depended on others for transportation to Indianapolis; (2) before the deposition, Father had not failed to appear, either in person or by counsel for any matter in the case; (3) Father contacted his attorney the night before the scheduled deposition and informed her that his planned transportation to Indianapolis had fallen through; (4) Father’s attorney contacted Adoptive Parents’ attorney and requested that the deposition be rescheduled for the afternoon of April 18, or that the deposition be taken via telephone, but Adoptive Parents’ attorney refused to reschedule the deposition or to take the deposition via telephone. *Id.* at 171-72. In support of his contention that dismissal of his motion to contest the adoption based on his failure to attend the deposition was unjust, Father cited *Nagel v. Northern Indiana Public Service Company*, 26 N.E.3d 30, 39-40 (Ind. Ct. App. 2015), *trans. denied*. *L.G.* at 172. In *Nagel*, the Court said that, “[i]n determining the appropriateness of default judgment as a discovery sanction, there is a marked preference in Indiana for deciding disputes on their merits...” *L.G.* at 172. Quoting *Wright v. Miller* 989 N.E.2d 324, 330 (Ind. 2013), the court said that, “[i]f possible, trial courts should impose sanctions that have a minimal effect on the evidence presented at trial and should not impose sanctions at all if the circumstances indicate that sanctions would be unjust.” (Emphasis added in *L.G.* at 172). The Court held that dismissal of Father’s motion to contest the adoption based solely on his failure to appear for his first scheduled deposition, despite his offer to be deposed late that *same day* was unwarranted and, given the fundamental interests at stake, unjust (emphasis in opinion). *Id.* at 172. The Court agreed with Father that the fundamental importance of the issues in this matter warranted less draconian ways to sanction him for his failure to appear at his deposition. *Id.* at 173. The Court opined that Adoptive Parents’ attorney’s outright rejection of Father’s request to reschedule Father’s deposition from the morning to the afternoon of the same day or at any other time by the attorney for was unreasonable. *Id.* Given that there was no hearing set to contest the adoption,

the Court found Adoptive Parents had not shown undue prejudice by Father's failure to appear at his first scheduled deposition. Id.

The Court suggested that Judge Nation should recused himself on remand. Id. at 177. The Court noted that, in his application for the impending vacancy on the Court caused by justice Dickon's retirement announcement, Judge Nation was required to provide the names of three attorneys who had litigated substantial cases in his court and who would be in positions to comment on his qualifications. Id. at 174. Judge Nation designated Adoptive Parents' attorney as one of his three references, and the attorney then wrote a letter to the Judicial Nominating Commission endorsing Judge Nation's application. Id. The Court ascribed no improper motive to Judge Nation or to Adoptive Parents' attorney. Id. Citing Bloomington Magazine v. Kiang, 981 N.E.2d 61, 64 (Ind. Ct. App. 2012), the Court explained that the mere appearance of bias or partiality may require recusal if an objective person, knowledgeable of all of the circumstances, would have a rational basis for doubting the judge's impartiality. L.G. at 175. The Court said that the issue was not whether the judge was biased or incapable of setting aside his relationship with Adoptive Parents' attorney, but rather whether an objective person would rationally doubt the judge's impartiality given that Adoptive Parents' attorney wrote the letter of recommendation after Judge Nation expressly designated the attorney as a reference. Id. The Court explained that this question was larger than this particular case and implicated public confidence in the administration of justice. Id. The Court also noted that the trial court's findings and conclusions demonstrated the court's negative assessment of Father's credibility and character, as well as his motives for objecting to the unqualified release of his mental health records. Id. at 176. The Court was significantly concerned that the trial judge, or any judge similarly situated, would have difficulty setting aside such findings and conclusions, including the judge's determination that Father was not credible. Id. The Court was also concerned that, if the trial judge were to remain on the case on remand, he "may tend to lean over backwards or overreact in an effort to be fair and impartial" in light of his earlier strongly stated positions. Id. at 177.