

Children's Law Center of Indiana



Adoption

3/16/17

In **Matter of Adoption of C.J.**, 71 N.E.3d 436 (Ind. Ct. App. 2017), the Court reversed the adoption court's decree which granted Stepmother's petition for adoption of Birth Mother's child. *Id.* at 444. The Court remanded for a new hearing on the issue of Birth Mother's consent, at which, absent a knowing and voluntary waiver of her rights, Birth Mother should be afforded the right to retain counsel or have court appointed counsel if the adoption court determined that she was indigent. *Id.* The child was born on September 8, 2009. Father and Birth Mother executed a paternity affidavit the next day. A paternity action was commenced in the Johnson Circuit Court (paternity court), and on January 11, 2012, the paternity court awarded legal and physical custody of the child to Father. The paternity court ordered Birth Mother to pay \$25 per week in child support and to have supervised parenting time as agreed upon by the parties. Since Birth Mother had a substance abuse addiction, she was also ordered to complete a hair follicle drug test in order to increase her parenting time in accordance with the Indiana Parenting Time Guidelines. Birth Mother never successfully passed a drug screen. She initially participated in supervised parenting time several times per week at Father's home, but ceased exercising parenting time in the summer of 2012 when Father's girlfriend and her daughter moved in with Father and the child. Birth Mother last saw the child in December 2012. On January 2, 2013, Father married his girlfriend, and she became the child's Stepmother. Stepmother assumed the maternal role in the child's life and was appointed the child's temporary guardian by the paternity court from January of 2013 until December of 2013 while Father was deployed to Afghanistan.

On August 14, 2014, Stepmother filed a petition to adopt the child in the Johnson Superior Court (adoption court). Father filed his consent to Stepmother's adoption of the child. In the adoption petition, Stepmother alleged that Birth Mother's consent to the adoption was not required because Birth Mother had not "for a period of at least one year, and without justifiable cause, communicated with the child when able to do so" and because Birth Mother had "abandoned and deserted the child for at least six months immediately prior to the filing of the adoption petition." On June 9, 2015, Stepmother amended her petition, adding that Birth Mother's consent to the adoption was not required because she had failed to provide child support for the child for at least one year in accordance with the paternity court's order. Father and Stepmother hired an investigator to locate Birth Mother, and she was served with notice of the adoption petition in November 2014, three months after the petition was filed. Birth Mother was incarcerated from September of 2013 until June of 2014. After her release and prior to receiving notice of the adoption petition, Birth Mother filed a motion for modification of her parenting time in the paternity court, a letter requesting joint custody of the child, and a request for assistance in being able to visit the child. On November 6, 2014, the paternity court issued an order finding it would

be in the child's best interest for Birth Mother to resume exercising parenting time with a twenty-week phase-in period, following which she would have parenting time in accordance with the Guidelines. Birth Mother filed her objection to the child's adoption on November 24, 2014, claiming that she had never abandoned the child and asserting that Father and Stepmother had denied her efforts to see or communicate with the child. Birth Mother filed a motion to consolidate the adoption case with the paternity case on December 23, 2014. On January 21, 2015, the paternity court transferred its case to the adoption court. Stepmother's home study by a social worker from Children's Bureau was filed on April 7, 2015. The home study included checks into Stepmother's criminal history and involvement with the Department of Child Services and recommended that Stepmother's petition be granted provided that the child was legally free for adoption.

On June 25, 2015, the adoption court held the hearing on the issue of whether Birth Mother's consent was required for the adoption. At the beginning of the hearing, Birth Mother informed the court that her attorney had withdrawn three months earlier due to her inability to afford him. Birth Mother requested that the court appoint a new attorney to represent her. The adoption court questioned Birth Mother about her income, and she testified that she worked forty to forty-five hours per week for a cleaning company earning \$10.00 per hour and about twenty-five hours each week for another company earning \$7.50 per hour. Birth Mother described her monthly expenses totaling \$855.00. The adoption court determined that Birth Mother had sufficient income to pay for an attorney and therefore had made a "voluntary choice" to proceed without the assistance of counsel. Stepmother presented her case in chief, and testified that Birth Mother: (1) saw the child on two occasions in 2012; (2) made one attempt to see the child in 2013, but cancelled the meeting due to a job interview; (3) made no effort to communicate with the child while incarcerated; (4) made two requests to see the child in 2014, one of which was after the petition for adoption had been filed; (5) never showed up for the phase-in parenting time ordered by the paternity court. Stepmother testified that she never interfered with Birth Mother's attempts to have parenting time. Father testified that between June 28, 2011, and June 23, 2015, Birth Mother had paid \$2,757.60 in child support and was \$2,417.40 in arrears.

During Birth Mother's case-in-chief, she contradicted the testimony of Stepmother and Father. Birth Mother testified that: (1) she participated in parenting time with the child on a regular basis at Father's house until Stepmother moved in, at which time she was no longer permitted to see the child; (2) there were multiple occasions over the years where she was refused parenting time by Father and stepmother who refused to answer the door and ignored her phone calls and text messages to them; (3) the last time she was permitted to see the child was in December of 2012; (4) she continued to send text messages on a daily basis, begging to see the child; (5) by the time of the hearing, she had been sober for two years. The adoption court asked Birth Mother a number of questions, after which Stepmother's attorney objected, arguing that the court was acting as an advocate for Birth Mother. The adoption court discontinued further examination, appointed an attorney to represent Birth Mother, and continued the hearing.

On October 29, 2015, the adoption court resumed the hearing on the issue of Birth Mother's consent. Birth Mother appeared with her court appointed attorney. The adoption court clarified at

the beginning of the hearing that it was “a continuance of the June 25th hearing, not a new hearing, so [they were to] pick up where [they] left off.” Mother testified that throughout 2012, 2013, and 2014 (with the exception of the time she was incarcerated), her attempts to see the child were thwarted by Father and Stepmother. On December 15, 2015, the adoption court issued its Order on Mother’s consent, in which the court found that Birth Mother’s consent to the child’s adoption was not required pursuant to IC 31-19-9-8(a)(2)(A) because she had failed to communicate with the child for at least one year. The court determined that Stepmother had failed to meet her burden of proving that Birth Mother was capable of paying support. On July 20, 2016, the adoption court conducted a hearing on Stepmother’s adoption petition as to the issue of the child’s best interest. On August 8, 2016, the adoption court issued its Decree of Adoption, finding by clear and convincing evidence that it was in the child’s best interest to be adopted by Stepmother. Mother appealed.

The Court applied a less stringent prima facie error standard of review in making its decision because Stepmother had not filed an appellee’s brief. *Id.* at 442. Quoting *In Re Adoption of N.W.R.*, 971 N.E.2d 110, 112 (Ind. Ct. App. 2012), the Court said it was well established that the Court “will not undertake the burden of developing arguments for the appellee.” *C.J.* at 442. The Court explained that it could reverse the adoption court if Birth Mother established prima facie error. *Id.* The Court said that “[p]rima facie error is defined as at first sight, on first appearance, or on the face of it”, quoting *Adoption of N.W.R.* at 112. *C.J.* at 442. Quoting *In Re Adoption of S.O.*, 56 N.E.3d 77, 80 (Ind. Ct. App. 2016), the Court noted that it will not overturn an adoption “unless the evidence at trial led to but one conclusion and the trial court reached the opposite conclusion.” *C.J.* at 442.

The Court concluded that Birth Mother’s due process rights were violated by the adoption court’s failure to, at the beginning of the consent hearing, either afford Birth Mother with her right to counsel or otherwise ensure that her waiver of the right to counsel was knowing and voluntary. *Id.* at 444. Birth Mother claimed that the adoption court committed reversible error by failing to appoint an attorney to represent her until after Stepmother had rested her case at the hearing on Birth Mother’s consent. Quoting *Petition of McClure*, 549 N.E.2d 392, 395 (Ind. Ct. App. 1990), the Court noted it has found a violation of due process if a child is removed from “an indigent parent without affording that parent the right to assistance of court-appointed counsel.” *C.J.* at 442. The Court looked to IC 31-32-2-5, which states that “[a] parent is entitled to representation by counsel in proceedings to terminate the parent-child relationship.” *C.J.* at 442. The Court noted that IC 31-32-5-5 provides that the right to counsel in a termination proceeding may only be waived “if the parent does so knowingly and voluntarily.” *C.J.* at 443. The Court explained that, because a biological parent’s rights are necessarily terminated by an adoption, it has previously been held that “[t]he rights afforded by the involuntary termination statutes apply in adoption proceedings where the petitioners seek to adopt over the objections of one or both of the natural parents.” *C.J.* at 443, quoting *Taylor v. Scott*, 570 N.E.2d 1333, 1335 (Ind. Ct. App. 1991). Quoting *In Re Adoption of G.W.B.*, 776 N.E.2d 952, 954 (Ind. Ct. App. 2002), (quoting *Taylor*, 570 N.E.2d at 1335) the Court observed that parents whose rights will be terminated in an adoption proceeding “have three rights:

(1) ‘the right to be represented by counsel’; (2) ‘the right to have counsel appointed if [they] could not afford private representation’; and (3) ‘the right to be informed of the two preceding rights.’” C.J. at 443. The Court noted that in this case: (1) Birth Mother requested the appointment of counsel at the beginning of the consent hearing because she could not afford an attorney; (2) the adoption court made an initial determination that Birth Mother had sufficient income and did not qualify for appointed counsel; (3) after Stepmother rested her case, Birth Mother was unsure how to proceed with the presentation of her evidence; (4) after an objection by Stepmother’s attorney, the adoption court determined Birth Mother was entitled to appointed counsel and recessed the hearing. Id. Birth Mother contended that, had she been represented by an attorney during Stepmother’s case-in-chief, her attorney could have explored inconsistencies in the testimony of Father and Stepmother, which might have impacted the adoption court’s decision on the necessity of Birth Mother’s consent. The Court found it clear that the proceedings concerning Birth Mother’s consent, including the time when she was not represented, flowed directly into the adoption court’s decision to terminate her parental rights. Id. at 443.

The Court disagreed with the adoption court’s finding that Birth Mother had made a “voluntary choice” to proceed without the assistance of counsel. Id. at 444. The Court noted that, once Birth Mother learned that she might be able to have court appointed representation, she made it clear that she preferred to have the assistance of an attorney instead of proceeding *pro se*. Id. The Court found that nothing in the record demonstrated that the adoption court did anything to impress upon Birth Mother the serious consequences she faced if she represented herself. Id. Because the Court found that Birth Mother had established a *prima facie* case that she was deprived of an essential right in violation of due process, the Court reversed the adoption court’s decree. Id.