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Adoption

12-29-2003

In **McElvain vs. Hite**, 800 N.E.2d 947 (Ind. Ct. App. 2003), decided December 29, 2003, the Court reversed the trial court's order granting the stepfather's petitions for adoption. The father and the mother had divorced in 1998. There were two children of the marriage, K.M. and C.M. The mother married the stepfather in 2001 and the two children resided with them. The stepfather filed petitions to adopt both children and terminate the parental rights of the father. At the hearing on the petitions on March 14, 2003, the mother testified that the father had last seen the children in January of 2002. The father testified that the mother had been frustrating his contact with the children in order to prevent visitation. The father testified that the children had an overnight with him "within a month of" August 2001, that he had seen K.M. at school when she fell and required stitches, and that he had seen the children several times, without the mother's knowledge, when a mutual friend of the mother and the father were watching the children. Additionally, the mother testified that the father had failed to pay child support for most of 2002 up until August 21, 2002. The father admitted he had failed to pay child support, but testified that the failure to pay child support was due to the loss of his unemployment benefits. He testified that he had maintained support payments before he was unemployed and resumed the child support payments upon obtaining a part-time job at a liquor store. In a prior order, the trial court did not find the father in contempt for failing to pay child support, but did calculate an arrearage. The trial court granted the stepfather's petition stating that the father was "too little too late." The father filed a motion to correct error which was denied.

The father did not fail to communicate significantly with the children for the year period prior to the filing of the petitions, and father's visits did not give rise to the inference that the visits were insignificant or token efforts. Indiana Code Section 31-19-9-8(a)(2) states "consent to adoption is not required from a parent of a child in the custody of another person if for a period of at least one year the parent (A) fails without justifiable cause to communicate significantly with the child when able to do..." Additionally, Indiana Code Section 31-19-9-8(b) states "if 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." The evidence presented by the father regarding the visits with the children show that he had communicated with the children in the one year period before the petitions were filed. Additionally, the Court believed that these visits were not insignificant or token visits. McElvain at 949.

The father did not fail to provide for the care and support of the children. Indiana Code Section 31-19-9-8(a)(2)(B) states that consent to adoption is not required when the parent “knowingly fails to provide for the care and support of the child when able to do so as required by law or judicial decree. The Court stated that the evidence showed that one the father obtained employment, he had support payments withheld from his salary. McElvain at 950. Additionally, the Court stated that there was no evidence that the father was able to pay support after he lost his unemployment benefits. Id. Finally, the Court stated that the trial court had held the father was not in contempt for failing to maintain support. Id.