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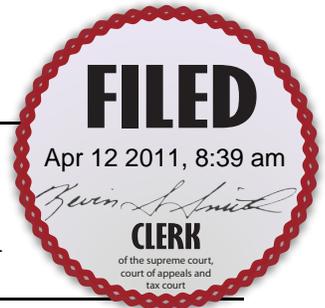
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**IN THE
COURT OF APPEALS OF INDIANA**



ISAIAH HARLOW,)

Appellant-Respondent,)

vs.)

No. 29A02-1009-AD-1091

WILLIAM RUSHING and JESSICA RUSHING,)

Appellees-Petitioners.)

APPEAL FROM THE HAMILTON SUPERIOR COURT
The Honorable Steven R. Nation, Judge
Cause No. 29D01-1002-AD-266

April 12, 2011

MEMORANDUM DECISION - NOT FOR PUBLICATION

NAJAM, Judge

STATEMENT OF THE CASE

I.H. (“Father”) appeals the trial court’s order following a hearing on whether W.R. and J.R. (“Adoptive Parents”) need Father’s consent to adopt his natural son J.H. (“the child”). We consider a single issue on review, namely, whether the trial court erred when it found that Father’s consent to adoption was not required.

We affirm.

FACTS AND PROCEDURAL HISTORY

T.H. (“Mother”) gave birth to the child on July 3, 2005, in Hamilton County. Father¹ and Mother were never married, and at the time of the child’s birth, Father was incarcerated. He was released on March 15, 2007, but was incarcerated again from April 17 through June 7, 2007. During the latter period of incarceration, Mother and the child lived with Adoptive Parents, Mother’s stepfather and mother.

From June 2007 to August 2, 2007, Father lived with Mother and the child in Florida. On August 2, Mother died of a drug overdose. Father and the child were present when Mother died. On the same date, Florida’s Child Protective Services agency took custody of the child. And on August 3, Father flew to Indiana without the child.

After Mother died, Adoptive Parents traveled to Florida and participated in the guardianship hearings there. Father did not appear and was not represented at the Florida guardianship proceedings. After a Florida court awarded temporary guardianship to Adoptive Parents, the Adoptive Parents returned to Indiana with the child. On September

¹ The parties do not state whether Father ever established paternity of the child. However, Adoptive Parents do not challenge Father’s biological relationship to the child.

27, 2007, the trial court in Hamilton County granted permanent guardianship to Adoptive Parents. Father did not appear in those proceedings.

The child has lived with Adoptive Parents since August 2, 2007. Sometime after Adoptive Parents returned to Indiana from Florida, Father went to Adoptive Parents' home in Noblesville "with the assistance of law enforcement" in order to see the child, but Adoptive Parents were not home. Appellant's Brief at 2. Father was incarcerated again on January 8, 2008, for theft, burglary, and possession of stolen property. He remains incarcerated at the time of this appeal, and his earliest release date is October 14, 2014.

Following his incarceration in January 2008, Father wrote to the child ten to fifteen times, but Adoptive Parents testified that they only received one letter addressed to the child from Father. Since his incarceration, Father also asserts that he "filed for visitation" with the child through the court three times. Each of his requests was denied.²

On February 8, 2010, Adoptive Parents filed a petition for adoption. On March 1, Father filed a pro se response objecting to the adoption. On April 27, the trial court appointed counsel for Father. At a 0068earing held June 15, the parties agreed to try the issue of whether Father's consent to adoption was required under Indiana Code Section 31-19-9-8. At the close of evidence, the trial court took the matter under advisement and ordered the parties to submit proposed findings and conclusions thereon by June 14. On June 30, the court requested the parties to submit additional briefing concerning the holding in Murphy v. Vanderver, 349 N.E.2d 202 (Ind. Ct. App. 1976), regarding

² The record contains no evidence of any proceedings in which Father allegedly sought court-ordered visitation.

abandonment. The parties submitted proposed findings and conclusions as well as the requested supplemental briefing. On August 19, the trial court entered its Findings of Fact and Conclusions of Law (“Order”), concluding that Father’s consent to adoption is not required under Indiana Code Section 31-19-9-8(a)(1) and (2). Father now appeals.

DISCUSSION AND DECISION

Father appeals the trial court’s Order finding that his consent to the adoption was not required under Indiana Code Section 31-19-9-8. Our standard of review in adoption cases is well-settled:

When reviewing a trial court’s ruling in an adoption proceeding, we will not disturb that ruling unless the evidence leads to but one conclusion and the trial judge reached an opposite conclusion. Rust v. Lawson, 714 N.E.2d 769, 771 (Ind. Ct. App. 1999), trans. denied. We will not reweigh the evidence but instead will examine the evidence most favorable to the trial court’s decision together with reasonable inferences drawn therefrom to determine whether sufficient evidence exists to sustain the decision. Id. The decision of the trial court is presumed to be correct, and it is the appellant’s burden to overcome that presumption. Id.

M.A.S. v. Murray, 815 N.E.2d 216, 218-19 (Ind. Ct. App. 2004).

Additionally, the trial court entered findings and conclusions sua sponte pursuant to Indiana Trial Rule 52(A). We have described our standard of review in such cases as follows:

[T]he specific findings control only as to the issues they cover, while a general judgment standard applies to any issues upon which the court has not found. Thus, in reviewing this judgment, we must apply a two-tiered standard. First, we determine whether the evidence supports the findings and second, whether the findings support the judgment. In deference to the trial court’s proximity to the issues, we will reverse a judgment only when it is shown to be clearly erroneous. A judgment is clearly erroneous when it is unsupported by the findings of fact and conclusions entered on the findings. In determining the validity of the findings or judgment, we consider only the evidence favorable to the judgment and all reasonable

inferences to be drawn therefrom, and we will not reweigh the evidence or assess the credibility of witnesses. However, although we defer substantially to findings of fact, we do not do so to conclusions of law. We evaluate questions of law de novo and owe no deference to a trial court's determinations of such questions.

Harris v. Harris, 800 N.E.2d 930, 934 (Ind. Ct. App. 2003) (citations omitted), trans. denied. Our rule concerning general judgment controls as to the issues upon which the court has not made findings. Myers v. Leedy, 915 N.E.2d 133, 140 (Ind. Ct. App. 2009) (citing Cochran v. Rodenbarger, 736 N.E.2d 1279, 1281 (Ind. Ct. App. 2000)), trans. denied. And we affirm a general judgment if it is sustainable on any legal theory. Id. (citing Lake County Auditor v. Burks, 802 N.E.2d 896, 900 (Ind. 2004)).

We initially address Adoptive Parents' burden of proof. Father states that Adoptive Parents were required to prove the elements of Section 31-19-9-8 by "clear and indubitable evidence." Appellant's Brief at 6 (internal quotations omitted). We recently discussed the split of authority regarding the burden of proof in adoption cases in In re Adoption of M.B., ___ N.E.2d ___, 2011 Ind. App. LEXIS 239, at *8 (Ind. Ct. App. February 24, 2011), not yet certified. There, we held that, "absent statutory authority to the contrary, the burden of proof for an adoption without consent, under any of the subsections in Section 31-19-9-8, is the clear and convincing evidence standard." Id. at *8 (citing M.A.S., 815 N.E.2d at 220). Thus, Adoptive Parents were required to prove by clear and convincing evidence that Father knowingly failed without justifiable cause to communicate significantly with the child when able to do so or that he knowingly failed to provide for the care and support of the child when able to do so as required by law or

judicial decree. See Ind. Code § 31-19-9-8(2); In re Adoption of M.B., 2011 Ind. App. LEXIS 239, at *8.

Father alleges that the trial court erred in concluding that his consent to the adoption is not required pursuant to Indiana Code Section 31-19-9-8. That statute provides, in relevant part:

Consent to adoption, which may be required under [Indiana Code Section 31-19-9-1], is not required from any of the following:

- (1) A parent or parents if the child is adjudged to have been abandoned or deserted for at least six (6) months immediately preceding the date of the filing of the petition for adoption.
- (2) A parent of a child in the custody of another person if for a period of at least one (1) year the parent:
 - (A) fails without justifiable cause to communicate significantly with the child when able to do so; or
 - (B) knowingly fails to provide for the care and support of the child when able to do so as required by law or judicial decree.

Ind. Code § 31-19-9-8(a). Specifically, Father contends that the trial court erred when it concluded that he had failed without justification to communicate significantly with the child when able to do so.³ We cannot agree.

Again, a natural parent's consent to adoption is not required if the parent "fails without justifiable cause to communicate significantly with the child when able to do so[.]" Ind. Code § 31-19-9-8(a)(2)(A). It is worth noting that the statute requires

³ Father also contends that the trial court erred in concluding that his consent for the adoption was not required because he had abandoned the child, see Ind. Code § 31-19-9-8(a)(1), and in concluding that his consent was not required because he had knowingly failed to provide care and support for the child when able to do so as required by law or judicial decree, Ind. Code § 31-19-9-8(a)(2)(B). Because we find that the trial court did not err in concluding that Father's consent was not required under Section 31-19-9-8(a)(2)(A), we need not consider Father's other contentions.

significant communication. Id.; see also In re Adoption of Herman, 406 N.E.2d 277, 279 (Ind. Ct. App. 1980) (emphasis added). Further, the one-year period without communication may but need not immediately precede the filing of the petition for adoption. See Ind. Code § 31-19-9-8(a)(2)(A); In re Herman, 406 N.E.2d at 279.

Here, the trial court found, in relevant part, that Father has not seen or had any contact with the child since August 2, 2007, when he left the child in Florida and that Father has been incarcerated since December 8, 2008. The trial court also found that, from August 3, 2007, through January 8, 2008, a period when Father was not incarcerated, “he had the opportunity to communicate with [the child] but he failed to do so.” Appellant’s App. at 9. And the trial court found that “Father’s claims of attempting to see the child are not credible.” Id. at 8. As a result, the trial court concluded that Father had failed to communicate significantly with the child for at least one year or more when able to do so.

Father argues that he “made several attempts at calling [Adoptive Parents’] home to speak with or to make arrangements to see” the child, but Adoptive Parents refused to speak with him. Appellant’s Brief at 2. He also maintains that he tried to communicate by writing ten to fifteen letters to the child in 2008. The last letter was returned to Father unopened in December 2008 and was marked “not at this address.” Id. at 20. Father also alleges that Adoptive Parents thwarted his efforts to communicate with the child by not giving him their mailing or any other address.

The trial court made no specific findings about Father’s alleged attempts to contact the child by telephone or by mail. But the trial court did not believe Father’s testimony

on these points, as evidenced by its finding that Father did not communicate significantly with the child and the fact the court said Father was not credible. Father's arguments regarding his 2008 attempts to contact the child are merely a request for us to reweigh the evidence. We will not do so. M.A.S., 815 N.E.2d at 218.

Further, Father had the option of asking the court for assistance in communicating with the child, but he did not do so. He testified that he had applied three times for a court order for visitation, but he offered no evidence of motions or court orders in support of that claim. And, again, the court found his testimony regarding attempts to see the child "not credible." Appellant's App. at 8. To the extent Father challenges that finding, again, we cannot reweigh that evidence. M.A.S., 815 N.E.2d at 218.

In any event, Father points to no evidence to show that he attempted to communicate with the child at all after December 2008 or that he was unable to do so. The trial court made no specific findings regarding Father's conduct during that period, but there is no evidence to show that Father attempted to communicate with the child or was unable to do so after December 2008. To the extent Father relies on his alleged attempts to seek court-ordered visitation "[b]etween January 2008 through the present," Appellant's Brief at 3, Father has not included proof of those attempts in the record on appeal. Adoptive Parents filed their petition for adoption in February 2010, more than one year after the evidence shows that Father last attempted to contact the child. Thus, Father has not shown that the trial court erred in concluding that Father did not communicate significantly with the child for at least one year when able to do so. As

such, the trial court did not err when it concluded that Father's consent to adoption is not required.

Affirmed.

ROBB, C.J., and CRONE, J., concur.