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IN THE
COURT OF APPEALS OF INDIANA

IN THE MATTER OF THE ADOPTION OF X.B.M.,	)	
H.P. and A.P.,	)	
Appellants-Petitioners,	)	
vs.	)	No. 68A05-1012-AD-775
K.M.,	)	
Appellee-Respondent.	)	

APPEAL FROM THE RANDOLPH CIRCUIT COURT
The Honorable David A. Kolger, Special Judge
Cause No. 68C01-0905-AD-66

August 4, 2011

MEMORANDUM DECISION - NOT FOR PUBLICATION

KIRSCH, Judge

H.P. and A.P. (collectively, "the Grandparents") appeal the trial court's denial of their petition to adopt X.B.M., their grandson. The sole issue for our review is whether the trial court erred in determining that the biological father's consent to the adoption was required and in denying the Grandparents' petition.

We affirm.

FACTS AND PROCEDURAL HISTORY

On July 17, 2003, X.B.M. was born to C.M. ("Mother") and K.M. ("Father") in Marion County, Indianapolis, Indiana. At the time of X.B.M's birth, Father and Mother were unmarried, but were together as a couple. Father signed a paternity affidavit at the hospital immediately after the child's birth. From the period after X.B.M.'s birth until Father's subsequent incarceration, Father was with X.B.M. on a daily basis.

On May 21, 2005, Father and Mother were married. Two weeks after they were married, Father, Mother, X.B.M., and a friend of Father's were involved in a car accident. The accident was fatal to both Mother and the friend. Father and X.B.M. suffered extensive injuries as a result of the accident. At the time of the accident, Father's injuries were significant enough that he agreed to an offer by the Grandparents, who were the parents of Mother, to assist Father in caring for X.B.M.'s injuries. Both Father and X.B.M. moved into the Grandparents' home. During this time, Father received a large sum of insurance money related to Mother's death.

Father used some of this money to pay off medical bills owed for the medical care of Mother, Father, and X.B.M. He also purchased a small home at a sheriff's sale and used the

money to renovate the home and purchase new appliances, furniture, two new vehicles, and clothes for him and X.B.M. Additionally, Father used some of the money to pay for a vacation to Florida for him and X.B.M. In August 2005, Father and X.B.M. moved into the new home he had purchased. Father lived alone with X.B.M. in the home until Father's current wife, Mary Meredith, and her three children moved into the home in 2006.

In 2004, prior to Mother's death, Father had been arrested and charged with operating while intoxicated and neglect of a dependent. Father was also arrested in October 2005 for possession of cocaine. In early 2006, Father realized that his legal troubles could result in a jail sentence for his offenses. Before his sentencing, Father had custody of X.B.M. with the Grandparents having weekend visits and watching X.B.M. when Father had court appearances. Around this time, Father and the Grandparents decided to make arrangements for the care of X.B.M. if Father became incarcerated.

On March 13, 2006, an agreement was signed and dated by Father and the Grandparents that was intended to be placed into effect in the event that Father was unable to take care of X.B.M. The agreement was drafted by the Grandparents' attorney. The agreement stated that, in the event of incarceration or other circumstances which precluded Father from caring for X.B.M., the Grandparents would be appointed guardians for the child until such time that Father's circumstances change such that he is again able to provide for X.B.M. *Appellants' App*. at 18-19, *Appellee's App*. at 1-2.

In January 2007, Father was sentenced to Indiana Department of Correction and the Wayne County Jail for his pending offenses. He was sentenced to one year for his possession

of cocaine conviction and to six months for his neglect of a dependent conviction. On January 29, 2007, the Grandparents filed the petition for appointment of guardianship of X.B.M. An order appointing the Grandparents as co-guardians of X.B.M. was issued the same date.

During the time that he was incarcerated, Father communicated with X.B.M. through telephone calls, visits, and letters. Father was released from incarceration on November 17, 2007. Upon his release, Father had a few brief visits with X.B.M., but did not have an overnight visit with him until Thanksgiving weekend. Father was given regular weekend visits through Christmas 2007, but shortly after Christmas, the Grandparents began banning overnight visits at Father's house and required all visits to be at their house. After January 2008, Father's visitation with X.B.M. was supervised and included mostly holidays such as Easter, Father's Day, Christmas, and the child's birthday. This situation continued through April 2009 when Father demanded to know when he would be able to regain custody of X.B.M.

After his release from incarceration, Father began working at a local lumberyard on March 17, 2008. Six months after he started his employment, Father was offered a health benefits package. He went to the Grandparents and offered to pay for health insurance for X.B.M. Father was told by the Grandparents that it was not necessary as they already had insurance for him. *Tr*. at 78. When Father came to visit X.B.M., he brought gifts to the child. He testified that he did so because, since the Grandparents had denied needing any money from Father for X.B.M., he thought that the gifts would be something X.B.M. could

use and would be meaningful from his Father. *Id*. at 80. Father testified that, when he went to visit X.B.M., he would ask the Grandparents if the child needed anything, and they would respond that he had "everything he needs right now." *Id*. Father testified that he had provided X.B.M. with gifts of a camera and film, Transformer toys, Easter basket with candy, Hot Wheels and case, and a Wii game.

On May 7, 2009, the Grandparents filed their petition for adoption. Father filed his "Disagreement with Adoption" on May 24, 2009. Hearings were held on March 2, 2010 and June 6, 2010 where evidence was presented regarding whether Father's consent was required for the adoption. On October 5, 2010, the trial court issued an order, finding that the Grandparents had failed to prove that Father's consent to the adoption was not required and denying the Grandparents' petition for adoption. The Grandparents now appeal.

DISCUSSION AND DECISION

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. *In re the Adoption of M.A.S.*, 815 N.E.2d 216, 218 (Ind. Ct. App. 2004) (citing *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*. at 218-19. The decision of the trial court is presumed to be correct, and it is the appellant's burden to overcome that presumption. *Id*.

The Grandparents argue that the trial court erred when it found that they failed to prove that Father's consent to the adoption was not required pursuant to Indiana Code section 31-19-9-8(a)(2)(B). They contend that they proved by clear and convincing evidence that Father had failed to provide for the care and support of X.B.M. for a period of at least one year when he had the ability to do so. Specifically, the Grandparents claim that there is a common law duty for a parent to support his or her child, regardless of whether a support order has been issued and that the lack of a support order in this case does not abate Father's duty. They further argue that, under the totality of the circumstances, the evidence they presented showed that, since the guardianship was ordered, Father did not provide any food or clothing for X.B.M., did not pay any money to the Grandparents, and did not support X.B.M. at any time. They assert that the testimony indicated that Father only provided token gifts to X.B.M. and that these token gifts should not be viewed as support for X.B.M.

Indiana Code section 31-19-9-1 provides, in pertinent part, that a petition to adopt a child who is less than eighteen years of age may be granted only if written consent to the adoption has been executed. However, Indiana Code section 31-19-9-8(a)(2)(B) states that the consent required under section 31-19-9-1 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 knowingly fails to provide for the care and support of the child when able to do so as required by law or judicial decree." We note that a petitioner for adoption without parental consent bears the burden of proving the statutory criteria for dispensing with such consent in Indiana Code section 31-19-9-8(a)(2)(B) by clear and convincing evidence. *In re the Adoption of M.B.*, 944 N.E.2d 73,

77 (Ind. Ct. App. 2011). If the evidence most favorable to the judgment clearly and convincingly establishes one of the criteria for granting adoption without parental consent, we will affirm the judgment. *In re the Adoption of M.A.S.*, 815 N.E.2d at 220. It is the appellant's burden to overcome the presumption that the trial court's decision was correct. *In re the Adoption of C.E.N.*, 847 N.E.2d 267, 271 (Ind. Ct. App. 2006).

Indiana law imposes a duty upon a parent to support his children. *In re Adoption of M.A.S.*, 815 N.E.2d at 220 (citing *Irvin v. Hood*, 712 N.E.2d 1012, 1014 (Ind. Ct. App. 1999)). This duty exists apart from any court order or statute. *Id.* Therefore, Father clearly had a common law duty to support his child, X.B.M. When determining issues of a non-custodial parent's ability to make support payments, it is necessary for the trial court to consider the totality of the circumstances. *Id*. at 221.

Here, the evidence most favorable to the trial court's decision shows that, anticipating that he would be incarcerated due to pending criminal charges, Father agreed with the Grandparents that they should serve as co-guardians of X.B.M. while Father was incarcerated. The parties executed a letter of understanding dated March 13, 2006, which was prepared by the Grandparents' attorney and stated that "in the event that your circumstances return to such that you are able to provide for the care and custody of [X.B.M.], that we shall voluntarily file a petition to terminate the guardianship . . . and return the child." *Appellants' App*. at 18-19. Although this document purported to "set forth our understanding with regard to the conditions and circumstances" for the Grandparents to become guardians of X.B.M., it made no reference to any obligation by Father to pay child

support to the Grandparents during the guardianship. *Id*. at 18. Consistent with the parties' agreement, when Father became incarcerated, the Grandparents' attorney filed a petition for guardianship, and the trial court appointed them guardians of X.B.M. The guardianship petition made no request for child support, and the trial court's order did not include a child support obligation. During the pendency of the guardianship, the Grandparents never requested that Father pay support or contribute to the support of X.B.M. No evidence was ever submitted by the Grandparents to a proposed amount of child support or any child support obligation worksheet. Father testified that whenever he inquired as to whether X.B.M. needed anything, the Grandparents informed him that the child had "everything he needs right now." *Tr*. at 80.

Additionally, when Father was able to obtain health benefits through his employment, he offered to pay for health insurance for X.B.M., but the Grandparents told him it was not necessary because they already had insurance for X.B.M. *Id*. at 78. Father brought various gifts to X.B.M. when he visited, including a camera and film, Transformer toys, Easter basket with candy, Hot Wheels and case, and a Wii game. He testified that he did so because, since the Grandparents had denied needing any money from Father for X.B.M., he thought that the gifts would be something X.B.M. could use and would be meaningful from his Father. *Id*. at 80. While incarcerated, Father had three visitations with X.BM. and attempted to call him as often as he could. *Id*. at 66-67. Upon his release, Father had a few brief visits with X.B.M., and had an overnight visit with him on Thanksgiving weekend. Father was given regular weekend visits through Christmas 2007, but shortly after Christmas,

the Grandparents began banning overnight visits at Father's house and required all visits to be at their house. After January 2008, Father's visitation with X.B.M. was supervised and included mostly holidays such as Easter, Father's Day, Christmas, and the child's birthday.

Viewing the evidence in a light most favorable to the trial court's decision as our standard of review requires, we conclude that the Grandparents have failed to show that the trial court erred when it denied their petition for adoption. Although Father did have a common law duty to support his child, the Grandparents consistently refused any support whenever Father offered, and after a certain point, they began restricting his visits with X.B.M. Under the totality of the circumstances, the trial court did not err in determining that the Grandparents failed to prove that Father's consent was not required because he knowingly failed to provide for the care and support of X.B.M. when he was able to do so as required by law or judicial decree. Any arguments of the Grandparents to the contrary are just a request for this court to reweigh the evidence, which we cannot do. *In re the Adoption of M.A.S.*, 815 N.E.2d at 218-19.

Affirmed.

VAIDIK, J., and MATHIAS, J., concur.