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IN THE
COURT OF APPEALS OF INDIANA

J. R.W.,	)	
	)	
Appellant,	)	
	)	
vs.	)	No. 49A02-0906-JV-550
	)	
K. R.,	)	
	)	
Appellee.	)	

APPEAL FROM THE MARION CIRCUIT COURT
The Honorable Louis Rosenberg, Judge
Cause No. 49C01-0702-JP-6817

November 20, 2009

MEMORANDUM DECISION - NOT FOR PUBLICATION

DARDEN, Judge

STATEMENT OF THE CASE

J.R.W. ("Mother") appeals the trial court determination that K.R. was the father of J.A.W.

We affirm.

ISSUE

Whether the trial court erred when it denied Mother's motion to dismiss and entered an order establishing K.R.'s paternity of J.A.W.

FACTS

J.A.W. was conceived in August of 1999. Beginning in September of 1999, K.R. was incarcerated; he was convicted of conspiracy to deal cocaine. On May 11, 2000, Mother gave birth to J.A.W. Father was released from prison to a half-way house in July of 2006, and when his status at the facility allowed, he began pursuing the establishment of paternity.

On February 21, 2007, a verified petition to establish paternity of J.A.W. (and provide support) was filed in Marion County by K.R. as J.A.W.'s "next friend." (App. 6). The petition alleged that K.R. was the father of J.A.W. and asked for an adjudication of same.

On March 19, 2007, Mother filed a motion to dismiss. She argued that pursuant to Indiana Code section 35-14-5-3(b), a paternity must be filed by a parent "no later than two (2) years after the child was born," and that K.R. was "not entitled to represent the

child as 'next friend'" because the action was "not in the best interest" of J.A.W. (App. 9). Subsequently, Mother filed a series of motions for continuances.

A hearing was held on January 3, 2008. The trial court acknowledged Mother's pending motion to dismiss. Mother testified that J.A.W. had lived in Greene County with her and her parents his entire life. Mother's counsel argued that K.R. "had no relationship" with J.A.W., and was "not entitled to bring any action as next friend." (App. 16).

K.R. then testified that he had sent a Christmas present to J.A.W. from prison, but it was returned; and that he had sent J.A.W. cards for "every birthday he had while [K.R.] was in prison," but these were also "sent back." (App. 22). He further testified that Mother "wouldn't bring [J.A.W.] to visit [him] in prison because she said it wasn't the right environment for him to be in." *Id.* at 18. K.R. testified that his family had facilitated his attempts to call J.A.W. from prison; often he "g[ot] the answering machine," but he did talk to J.A.W. "like ten to fifteen times" when he "got through." *Id.* at 19, 21. He also testified that J.A.W. "kn[e]w[] who [he] was," "call[ed] [him] 'Dad,'" and told K.R. "that he wish[ed] he could see [him]." *Id.* at 18. Since his release, Mother had brought J.A.W. to meet him once. K.R. admitted, however, that he had provided no support or contribution to J.A.W.'s upbringing.

Mother further testified that J.A.W. "received probably three" cards from K.R. but there had been no present, and she did not believe J.A.W. had seen or spoken to K.R. no more than four times. According to Mother, one of these times was when she took

J.A.W. as an infant to see K.R., and another was when she took J.A.W. to see K.R. after his release from prison. *Id.* at 23. Mother admitted that K.R. had made "several phone calls" to J.A.W. but implied that he had not succeeded in talking to him because it was "late in the evening." *Id.* at 24. The trial court took the matter under advisement.

On January 10, 2008, according to the CCS, the trial court denied Mother's motion to dismiss. Thereafter, Mother filed several additional motions for continuances. On December 2, 2008, Mother filed a motion to transfer venue, alleging that "all witness and evidence pertaining to parenting time" were located in Greene County. *Id.* at 56. On January 22, 2009, the motion was denied. Mother filed a motion to reconsider the denial of her motion to transfer venue; and she filed three subsequent motions for continuances. On May 18, 2009, the trial court denied Mother's last motion for a continuance, maintaining the next hearing date of May 21, 2009.

On May 21, 2009, Mother counsel renewed her arguments that "all of the witnesses regarding parenting time" were in Greene County, and that she was "contesting his right to bring this action" as J.A.W.'s next friend and after the statute of limitation had expired. *Id.* at 33, 34. The trial court affirmed its denial of the motion to transfer venue, noting that parenting time and custody were separate matters, and that this court "exist[ed] to get paternity established." *Id.* at 47. The trial court admitted into evidence the genetic testing results, which found the probability of K.R.'s paternity to be "99.999%." *Id.* at 49. The trial court found that K.R. was J.A.W.'s father, and set a hearing for June 25, 2009, for issuance of a "final paternity judgment." *Id.* at 45, 46. On

June 25, 2009, the trial court issued its judgment of paternity and support, finding K.R. was "the father of . . . [J.A.W.]," and ordered his payment of child support in the amount of $82.00 per week.

DECISION

Mother argues that the trial court erred when it denied her motion to dismiss because K.R. "failed to bring a paternity action within two years of [J.A.W.]'s birth," and that K.R. cannot pursue paternity as J.A.W.'s "next friend" because he failed to demonstrate "that he has a significant relationship with [J.A.W.] and is acting in [J.A.W.]'s best interest." Mother's Br. at 5, 6. We disagree.

When the trial court considers evidence outside the pleadings in ruling on a motion to dismiss a paternity petition asserted to be untimely, the proceeding resembles one held under Trial Rule 12(B)(1). *In re R.P.D. ex rel. Dick*, 708 N.E.2d 916, 919 (Ind. Ct. App. 1999). Factual disputes bear on the trial court's jurisdiction, and the trial court must resolve such factual disputes. *Id.* Therefore, we defer to its factual findings and judgment. *Id.* We do not reweigh the evidence or assess witness credibility, and the trial court's "judgment will be reversed only when clearly erroneous." *Id.*

As Mother correctly notes, Indiana Code section 31-14-5-3 provides, in pertinent part, that "a man alleging to be the child's father . . . must file a paternity action not less than two (2) years after the child is born . . . ." However, the instant petition was filed by the Marion County prosecutor on behalf of J.A.W. by his "next friend [K.R.] pursuant to I.C. 31-14-4-2." (App. 6). Indiana Code section 31-14-4-2 provides that "upon the

request of . . . a man alleging to be the father, . . . the prosecuting attorney shall file a paternity action and represent the child in that action." Further, the law provides that a child under the age of eighteen may file a paternity petition through his "next friend"; such a paternity petition may be filed "at any time" before he reaches the age of twenty. I.C. § 35-14-5-2(a) and (b). *See Matter of P.L.M. by Mitchell*, 661 N.E.2d 898 (Ind. Ct. App. 1996) (paternity suit four years after child's birth by alleged father as her next friend not untimely), *trans. denied*.

In *J.R.W. ex rel. Jemerson v. Patterson*, 877 N.E.2d 487, 491 (Ind. Ct. App. 2007), we reviewed the numerous Indiana cases discussing "the right to file on behalf of the child as next friend." *Jemerson* makes clear that Indiana law authorizes "parents, guardians, guardians ad litem, and prosecutors" to "bring paternity actions as next friends of children." 877 N.E.2d at 491. The prosecutor brought this paternity action for K.R., as J.A.W.'s next friend; K.R. alleged he was J.A.W.'s father; and the action was filed at a time when J.A.W. was not yet seven years of age. Hence, the action here was timely.

Mother's authority for the proposition that K.R. was required to establish a significant relationship with J.A.W. is not persuasive. Only *R.P.D.* involves Indiana law. Further, *R.P.D.* did not discuss any definition of "next friend" for the purposes of bringing a paternity action. Moreover, Mother does not analogize *R.P.D.* to her case, and we find its facts too different from those at bar to warrant extensive discussion. Other cases cited by Mother as to the "next friend" relationship are not apposite. In *Morris v. United States*, 399 F. Supp. 720, 722 (E.D. Va. 1975), the "next friend" status concerned

a prisoner's habeas corpus petition; *Davis v. Austin*, 492 F. Supp. 273, 275-76 (N.D. Ga. 1980), also was an action by an individual asserting "next friend" status as to a prisoner; and *Groseclose ex rel. Harry's v. Dutton*, 594 F. Supp. 949 (M.D. Tenn. 1984), was another habeas corpus petition brought as "next friend" of an inmate.

In her reply, Mother directs us to a sentence in a recent opinion acknowledging "the apparent anomaly that a putative father barred by one statutory section from petitioning for paternity on his own behalf may nevertheless succeed in filing, under a different statutory section, substantially the same petition as next friend on behalf of the child." *In re Adoption of E.L.*, 913 N.E.2d 1276, 1282-83 (Ind. Ct. App. 2009). In that case, a paternity petition filed by R.J., "on behalf of E.L," asked the trial court to "find R.J. to be the father of E.L." and determine his child support obligation. *Id.* as 1278. The petition was filed nearly three years after E.L.'s birth. We noted the lack of statutory definition of 'next friend,'" but cited our conclusion in *P.L.M.* that "the putative father was a proper next friend" to file a paternity petition as the child's "next friend . . . notwithstanding statutory time limitations on a petition filed in the parent's own name. *Id.* at 1282. As to our observation of the anomaly of the statutory differences, we noted "the line of cases that, since 1992 . . . , have permitted a parent barred from petitioning for paternity on his or her own behalf to file a paternity petition as next friend on behalf of the child," and the fact that the general assembly's statutory revision of paternity statute in 1997 "did not alter the provision allowing a child to petition for paternity by next friend, but instead recodified it." *Id.* at 1282. We concluded that there was no

reason "to depart from" the common law precedents, and held that the trial court "erred in dismissing the petition as filed on behalf of E.L." *Id.*

The trial court's denial of Mother's motion to dismiss the petition of K.R. as next friend of J.A.W. was not clearly erroneous.

Affirmed.

MATHIAS, J., and ROBB, J., concur.