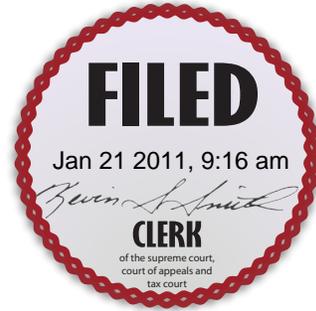


Pursuant to Ind.Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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**IN THE
COURT OF APPEALS OF INDIANA**

IN RE: THE ADOPTION OF:)
T.D.V AND M.B.V.,)
)
Minor Children,)
)
B.R.,)
)
Appellant-Petitioner,)
)
vs.)
)
J.V.,)
)
Appellee-Respondent.)

No. 15A05-1006-AD-364

APPEAL FROM THE DEARBORN CIRCUIT COURT
The Honorable, James D. Humphrey Judge
Cause No. 15C01-0911-AD-11 and 15C01-0911-AD-12

January 21, 2011

MEMORANDUM DECISION – NOT FOR PUBLICATION

Case Summary

B.R. (“Stepfather”) appeals the trial court’s denial of his petition to adopt T.V. and M.V. (“Children”). We affirm.

Issue

Stepfather raises three issues, which we consolidate and restate as whether the trial court erred by finding that the biological father’s consent to Stepfather’s petition to adopt the Children was necessary.

Facts

L.V.R. (“Mother”) and J.V. (“Father”) were married in 2003 and had two children, T.V., born in January 2004, and M.V., born in December 2005. They divorced in May 2008, and the dissolution decree ordered that the parties would share joint legal custody, that Mother would have physical custody, and that Father would have parenting time per the Indiana Parenting Time Guidelines. Father was ordered to pay \$171.00 per week in child support.

In November 2008, Mother married Stepfather. At some point, Father took a voluntary layoff because his employment was going to change to second shift, and it would have interfered with his parenting time. Father worked odd jobs and earned \$10,000.00 or less during 2009. Father made no voluntary child support payments between November 17, 2008, and December 3, 2009.¹ However, a child support payment

¹ The trial court found that Father made no voluntary child support payments between April 2, 2008, and December 3, 2009, but Stepfather concedes that this finding is erroneous. The evidence presented to the

of \$324.24 was made on October 9, 2009, from bail money as a result of his arrest for failure to pay child support.

In June 2009, Father filed a motion for change of custody, visitation, support, and for contempt. After a hearing in November 2009, the trial court denied Father's request for a modification of custody but granted Father's request to find Mother in contempt. The trial court found that "Mother willfully denied Father parenting time from approximately mid-April 2009, until the end of October, 2009." App. p. 72. Mother had apparently denied Father's parenting time because he did not have a valid driver's license, but the trial court found that the appropriate action would have been for Mother to seek relief from the trial court instead of denying parenting time on her own. As for child support, the trial court found that Father had "voluntarily left his employment" and imputed minimum wage to Father. Id. at 74. The trial court ordered Father to pay weekly child support of \$34.73.

In November 2009, Stepfather filed a petition to adopt the Children. Stepfather alleged, in part, that Father's consent to the adoption was unnecessary because he had "knowingly failed to provide for the care and support of the minor children." Id. at 77. Father filed an objection to the adoption by Stepfather, and the trial court appointed counsel for Father. After a hearing, the trial court entered findings of fact and conclusions thereon denying Stepfather's petition. The trial court found:

trial court demonstrates that Father made no voluntary child support payments between November 17, 2008, and December 3, 2009.

8. The Court finds that [Father's] testimony regarding the mother's lack of cooperation with child visitation is consistent with further evidence that was submitted by Petitioner in this Cause indicating that [Mother] was found in contempt by this Court for denying [Father] parenting time with [the Children], from approximately mid-April, 2009, to the end of October, 2009. . . .
9. The Court notes that . . . the finding that mother was in contempt for not allowing child visitation was during a substantial portion of the same time that [Stepfather] is alleging that the biological father did not pay support.
10. [Father] testified that he had been seeking full-time employment, but was not able to find full-time employment in 2009. He further testified that his approximate earnings for 2009 were around \$5,000.00, and no more than \$10,000.00. No evidence was presented to dispute this testimony.
11. [Father] testified that he regularly exercised visitation with both the children prior to April 2009 pursuant to the Indiana Parenting Time Guidelines, until their mother refused visitation. He testified that regular visitation resumed in approximately October 2009, and he has continued through the date of the hearing hereunder with cooperation from the mother.
12. The Court finds that there has been regular and substantial contact between [Father] and the children . . .
13. The Court finds that there was a period of time when the father was not paying child support as ordered by the Court. However, the Court further finds that the facts in this case are distinguished from other cases, such as Adoption of B.R., 877 N.E.2d 217 (Ind. Ct. App. 2007), and Adoption of M.A.S., 815 N.E.2d 216 (Ind. App. 2004), in that:
 - (a) The father maintained regular visitation during that time, when allowed by the mother, and

would support the children with significant food, clothing and shelter during all regularly scheduled visits pursuant to the Indiana Parenting Time Guidelines; and

- (b) Due to a lack of cooperation from the mother regarding child visitation, the father was attempting to find suitable employment that would allow for visitation with his children but he was unable to find and maintain full-time employment.

14. Therefore, the Court finds that [Stepfather] has failed to establish, by clear and convincing evidence, that the biological father failed to provide support for a period of one year and was able to do so.

Id. at 9-11. Stepfather now appeals.

Analysis

Initially, we observe that Father has not filed an appellee’s brief. “Under that circumstance, we do not undertake to develop an argument on the appellee’s behalf, but rather may reverse upon an appellant’s prima facie showing of reversible error.” Button v. James, 909 N.E.2d 1007, 1008-09 (Ind. Ct. App. 2009) (quoting Morton v. Ivacic, 898 N.E.2d 1196, 1199 (Ind. 2008)). “Prima facie error in this context is defined as, ‘at first sight, on first appearance, or on the face it.’” Id. at 1009 (quoting Morton, 898 N.E.2d at 1199).

Stepfather argues that the trial court erred by finding Father’s consent to Stepfather’s petition to adopt the Children was necessary. The trial court entered findings and conclusions sua sponte, and those findings and conclusions control only the issues they cover. Olcott Int’l. & Co., Inc. v. Micro Data Base Sys., Inc., 793 N.E.2d 1063,

1071 (Ind. Ct. App. 2003), trans. denied. We apply the following two-tier standard of review to sua sponte findings and conclusions: whether the evidence supports the findings, and whether the findings support the judgment. Id. Findings and conclusions will be set aside only if they are clearly erroneous, that is, when the record contains no facts or inferences supporting them. Id. “A judgment is clearly erroneous when a review of the record leaves us with a firm conviction that a mistake has been made.” Id. We consider only the evidence favorable to the judgment and all reasonable inferences flowing therefrom, and we will neither reweigh the evidence nor assess witness credibility. Id.

Stepfather argues the trial court erred by concluding that Father’s consent to the adoption was necessary. Indiana Code Section 31-19-11-1 provides that the trial court “shall grant the petition for adoption and enter an adoption decree” if the court hears evidence and finds, in part, that “proper consent, if consent is necessary, to the adoption has been given.” Indiana Code Section 31-19-9-8(a) provides, in part:

Consent to adoption, which may be required under section 1 of this chapter, is not required from any of the following:

* * * * *

- (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.

If an adoption petition alleges that a parent's consent to adoption is unnecessary under Indiana Code Section 31-19-9-8(a) and that parent files a motion to contest the adoption, "a petitioner for adoption has the burden of proving that the parent's consent to the adoption is unnecessary" under Indiana Code Section 31-19-9-8. Ind. Code § 31-19-10-1.2. Thus, Stepfather had the burden of proving that Father's consent was unnecessary, and he was required to meet this burden by clear and convincing evidence. See In re M.A.S., 815 N.E.2d 216, 220 (Ind. Ct. App. 2004).

It is undisputed that, other than the time period in which Mother denied parenting time to Father, Father regularly exercised parenting time and had significant communication with the Children. Stepfather argues the trial court erred when it found that he failed to prove that Father knowingly failed to provide for the care and support of the children, for a period of one year, when he able to do so as required by law or judicial decree. I.C. § 31-19-9-8(a). The trial court noted that Father had maintained regular parenting time with the Children and provided them with significant food, clothing, and shelter and that Father was unable to find and maintain full-time employment because of Mother's failure to cooperate with his parenting time. Thus, the trial court found that Father's consent to the adoption was necessary because: (1) Father provided care and support; and (2) Father was unable to provide more support.

We first address whether Father provided care and support for the Children. Stepfather equates "care and support" with the payment of court-ordered child support, but we have recognized that nonmonetary support also qualifies as "care and support."

I.C. § 31-19-9-8(a). We recently held that a parent’s duty of support “might be defined in nonmonetary terms.” In re Adoption of N.W., 933 N.E.2d 909, 914 (Ind. Ct. App. 2010). In N.W., we held that, although the noncustodial mother was not able to provide for the child monetarily, she provided the child with housing, clothing, food, entertainment, gifts, and other necessities when she exercised parenting time.² On the other hand, we have held that a noncustodial parent’s occasional provision of items to a child is a gift, not support. See M.A.S., 815 N.E.2d at 220 n.1 (holding that the father’s occasional provision of groceries, diapers, formula, clothing, presents, and cash were gifts, not support for his child); Irvin v. Hood, 712 N.E.2d 1012, 1013 (Ind. Ct. App. 1999) (holding that, although the father provided six items of clothing for the child and some food during the child’s visits with the paternal grandparents, the father provided no shelter, utilities, medical insurance, or other care or support for the child, nor did he pay any of the child’s medical or child care expenses, and his consent to the child’s adoption was unnecessary).

Here, Father exercised consistent parenting time with the Children until April 2009, when Mother refused to allow further parenting time. Parenting time resumed in November 2009, when the trial court found Mother in contempt. Although Father did not provide voluntary child support payments during the relevant time period from November 2008 to November 2009, he did provide the Children with housing and other

² Stepfather argues that N.W. is distinguishable because the mother in that case did not have a court-ordered child support obligation. Stepfather is again equating the “care and support” requirement of Indiana Code Section 31-19-9-8 with payment of court-ordered child support. We do not find this distinction persuasive.

necessities during his regular parenting time. Additionally, a child support payment of \$324.24 was made in October 2009, from bail money as a result of Father's arrest. The trial court found that Father provided "care and support" for the Children, and under these circumstances, we cannot say that the evidence leads to but one conclusion and the trial court reached an opposite conclusion. See I.C. § 31-19-9-8.

Stepfather also argues that the trial court erred by finding that Father was unable to provide support due to his inability to find and maintain full-time employment and Mother's lack of cooperation regarding parenting time. According to Stepfather, res judicata prevented the trial court from making this finding because it conflicted with a prior ruling by the trial court during the earlier modification. Res judicata consists of two distinct components—claim preclusion and issue preclusion. Finke v. N. Indiana Pub. Serv. Co., 899 N.E.2d 5, 9 (Ind. Ct. App. 2008). "Claim preclusion applies where a final judgment on the merits has been rendered which acts as a complete bar to a subsequent action on the same issue or claim between those parties and their privies." In re Adoption of Baby W., 796 N.E.2d 364, 373 (Ind. Ct. App. 2003), trans. denied. "Issue preclusion, also referred to as collateral estoppel, bars the subsequent relitigation of the same fact or issue where that fact or issue was necessarily adjudicated in a former suit and the same fact or issue is presented in a subsequent action." Id. Issue preclusion is at issue here. However, in issue preclusion, the former adjudication will only be conclusive as to those issues that were actually litigated and determined therein. Crosson v. Berry, 829 N.E.2d 184, 192 (Ind. Ct. App. 2005), trans. denied. "Issue preclusion does not extend to matters that were not expressly adjudicated and that can be inferred from the prior adjudication

only by argument.” Id. The trial court’s earlier finding was that, under the rules governing child support, Father was voluntarily unemployed and income would be imputed to him. This finding is different than the issue here, whether Father knowingly failed to provide for the care and support of the children, for a period of one year, when he able to do so as required by law or judicial decree. I.C. § 31-19-9-8. Thus, the trial court’s earlier finding is not determinative here, and res judicata does not apply.

Stepfather failed to demonstrate by clear and convincing evidence that Father knowingly failed to provide for the care and support of the children, for a period of one year, when he able to do so as required by law or judicial decree. Id. Rather, Father did, in fact, provide “care and support” for the Children. Id. Stepfather failed to meet his burden of showing that Father’s consent to the adoption was not required. The trial court properly denied Stepfather’s petition.

Conclusion

Father provided care and support for the Children during the relevant time period. Consequently, Father’s consent to Stepfather’s adoption of the Children was necessary. The trial court properly denied Stepfather’s petition. We affirm.

Affirmed.

BAKER, J., and VAIDIK, J., concur.