

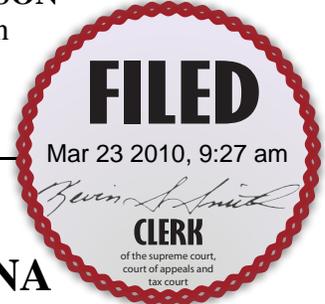
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**IN THE
COURT OF APPEALS OF INDIANA**

IN THE MATTER OF THE ADOPTION OF:)
L.H.,)
)
J.V. (Stepfather),)
)
Appellant-Petitioner,)
)
vs.)
)
A.H. (Father),)
)
Appellee-Respondent.)
)

No. 45A04-0906-CV-320

APPEAL FROM THE LAKE SUPERIOR COURT
The Honorable Mary Beth Bonaventura, Judge
The Honorable Katherine Garza, Referee
Cause No. 45D06-0804-AD-110

March 23, 2010

MEMORANDUM DECISION - NOT FOR PUBLICATION

VAIDIK, Judge

Case Summary

J.V. (“Stepfather”) appeals the trial court’s dismissal of his petition for the adoption of L.H., the biological child of his wife A.V. (“Mother”) and her ex-husband A.H. (“Father”). Finding that the trial court did not err by concluding that Stepfather did not prove by clear and convincing evidence that Father’s consent to the adoption is not required, we affirm.

Facts and Procedural History

Father is a native of Jordan. After Mother and Father married, Mother filed a petition with the Immigration and Naturalization Service¹ in support of Father’s application for legal permanent residence. Mother withdrew this petition when they divorced in March 2002. Father, who was an illegal alien, hired a lawyer and continued his attempts at gaining legal permanent residence. The dissolution decree awarded Mother sole legal and physical custody of their child, L.H., born March 21, 2000. It granted Father supervised visitation with L.H. at Children’s Tree House, a facility providing supervised visitation and exchange monitoring services, two times a week. The decree also determined Father’s weekly child support obligation to be \$49.

In October 2001, before the divorce, Father began exercising visitation under the terms of a provisional order. Although L.H. referred to Father as “Dad” in the beginning of the visitations, by September 2002 L.H. began referring to Father by his first name. Around that time L.H. also began to “regress” and “push away” from Father’s attention,

¹ As of March 1, 2003, the INS transitioned into the Department of Homeland Security as the United States Citizenship and Immigration Services. Nevertheless, we refer to the agency as INS throughout this opinion.

and “it got increasingly worse as the visits progressed.” Tr. p. 62. When L.H. turned three, she began refusing some of the visits altogether. However, when L.H. did not refuse visits, they “seemed to go pretty well.” Father brought L.H. gifts, and his interactions with her were “quite appropriate.” *Id.* at 55.

In December 2005 Father arrived at the parking lot of Children’s Tree House for a scheduled visitation and found INS agents waiting to take him into custody. Mother had given the INS information on how to find Father. When Father was released two weeks later, he hired a different lawyer and continued his attempts at gaining legal permanent residence.

The record shows that Father attempted to visit with L.H. every week from March 9, 2006, through April 20, 2006. In those seven attempted visits, L.H. refused to visit five times, Mother cancelled one time, and Mother and L.H. did not show up one time. At that point, Father suggested to Judith Haney, the executive director of Children’s Tree House, stopping the visits for a while to “give [L.H.] a break.” *Id.* at 71. Father called Children’s Tree House in August 2006 to resume the visits. A visit was scheduled, but L.H. “had a major emotional breakdown” and refused to see Father. *Id.* at 75. In September 2006 Haney sent identical letters to Mother and Father stating that “it is in [L.H.]’s best interests to discontinue Supervised Visitation until such time as she wants to see her father.” Petitioner’s Ex. 5.

Father sent two packages, one of which was a birthday present for L.H., to Mother’s home on two separate occasions. Mother mailed both packages back to Father unopened. Mother later testified that she did not think she had any obligation as a mother

to foster a relationship between L.H. and Father. She further testified that she and L.H. “would not talk about [Father].” Tr. p. 160.

Some time later, the INS presented Father with the option of voluntary departure. The availability of this option meant that instead of taking the chance of remaining illegally in the United States, being deported, and being barred from returning to the United States for ten years, Father could instead leave the United States at his own expense, wait for his application for legal permanent residence to be processed, and return to the United States legally in about a year. *Id.* at 18. In June 2007 Father married his girlfriend of two years, and she accompanied him when he went to Jordan under the terms of a voluntary departure order. While in Jordan, Father was offered a job that paid \$140 monthly for six-day work weeks. Father turned down the job and instead spent his time caring for his father, who recently had a kidney removed, and his mother, who has difficulty walking. As Father generated no income while in Jordan, his family provided for him and his wife financially while they were there.

In August 2007 Mother married Stepfather. In April 2008 Stepfather petitioned to adopt L.H. The petition included Mother’s consent to adoption and alleged that Father’s consent to adoption was not required. Father filed a *pro se* letter to the court in June 2008 which the court construed as a motion to continue and a motion to contest the adoption. Father returned to the United States in September 2008 as a legal permanent resident. In October 2008 Father called Children’s Tree House to schedule a visit with L.H. Haney made a phone call to Mother to schedule a visit, but Mother never returned her call. Also in that month Father’s attorney filed a motion to contest the adoption.

At the hearing, Father testified that he did not call L.H. because he believed the provisional order indicated that he was not allowed telephonic contact with her. Although the provisional order is not included in the record, the dissolution decree does state, "Husband is granted continued supervised visitation with the parties' minor child in accordance with the provisions set forth in the provisional order of this Court." Petitioner's Ex. 1 p. 2. Father also stated, "If I send a package to my daughter on her birthday and the package gets sent back to me, what makes you think that if I make a phone call, that they would answer the call?" Tr. p. 113.

Father testified that he worked as a waiter in the United States and generally made \$500 to \$550 each week. Father's child support obligation of \$49 weekly is equivalent to a \$2548 yearly obligation. The Lake County Clerk's records reveal that Father paid \$2100 in 2003, \$2200 in 2004, \$2000 in 2005, \$2000 in 2006, \$200 in 2007, and \$400 in 2008. From 2003 through 2007, Mother was additionally issued \$3754 in tax intercept checks.

The trial court dismissed Stepfather's petition for the adoption, stating that "Petitioner has not proven by clear and convincing evidence that Father's consent is not required. Father has refused to consent to the Adoption Petition." Appellant's App. p. 16. Stepfather now appeals.

Discussion and Decision

Stepfather contends that the trial court erred by concluding that he did not prove by clear and convincing evidence that Father's consent to adoption is not required. We restate his issues as whether Father: (I) abandoned L.H. for at least six months

immediately preceding Stepfather's adoption petition filing; (II) failed without justifiable cause, for at least one year, to communicate significantly with L.H. when able to do so; or (III) knowingly failed, for at least one year, to provide for the care and support of L.H. when able to do so.²

As a reviewing court, we will not disturb the trial court's decision in an adoption proceeding unless the evidence leads to but one conclusion and the trial court reached the opposite conclusion. *In re Infant Girl W.*, 845 N.E.2d 229, 238 (Ind. Ct. App. 2006), *trans. denied*. We will neither reweigh the evidence nor reassess the credibility of witnesses, and we will examine only the evidence most favorable to the trial court's decision. *Id.* The trial court here entered findings of fact and conclusions of law pursuant to Indiana Trial Rule 52(A). We thus employ a two-tiered standard of review: we must determine whether the evidence supports the findings and whether the findings support the judgment. *In re Adoption of H.N.P.G.*, 878 N.E.2d 900, 904 (Ind. Ct. App. 2008), *trans. denied, cert. denied*, 129 S.Ct. 619 (2008). We will not set aside the findings or the judgment unless they are clearly erroneous. *Id.* Findings of fact are clearly erroneous if the record is devoid of any evidence or reasonable inferences to support them, while a judgment is clearly erroneous when it is unsupported by the findings of fact and the conclusions relying on those findings. *Id.*

² Although the trial court did not make any findings and thus did not base its conclusions on Father's fulfillment of the three requirements provided in the dissolution decree in order for him to receive unsupervised visitation with L.H., both parties discuss them. Father must: (1) provide a written report from a psychiatrist stating that he is not a danger to himself or others, (2) provide documentation from the INS showing that he is legally residing in the United States, and (3) certify that he does not possess firearms or a permit to own or carry a firearm. Petitioner's Ex. 1 p. 2. The record indicates that Father provided his attorney with a psychiatric report and proper certification regarding firearms, Tr. p. 106, and Father's return to the United States in September 2008 was as a legal permanent resident.

Indiana Code section 31-19-9-8, which specifies when consent to adoption is not required, provides in pertinent part:

(a) Consent to adoption, which may be required under section 1 of this chapter, 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.

If an adoption petition alleges that a parent's consent to adoption is unnecessary under Subsection 31-19-9-8(a)(1) or (a)(2), 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 Section 31-19-9-8. Ind. Code § 31-19-10-1.2.

Stepfather's adoption petition alleged that Father's consent was not required under Subsection 31-19-9-8(a)(1) or (a)(2). Father contested the adoption both in a *pro se* letter written to the trial court in June 2008 when he was in Jordan and in a formal filing in October 2008 when he returned to the United States. Stepfather thus has the burden of proving that Father's consent is not required. Stepfather's burden of proof is clear and convincing evidence. *See In re Adoption of M.A.S.*, 815 N.E.2d 216, 219-20 (Ind. Ct. App. 2004) (concluding that the petitioner was required to prove by clear and convincing evidence that the father's consent was not required under Indiana Code section 31-19-9-8(a)(2) using a rationale that is equally applicable to Indiana Code section 31-19-9-8(a)(1)).

I. Abandonment

Stepfather first asserts that the trial court erred by concluding that he did not prove by clear and convincing evidence that Father abandoned L.H. for at least six months immediately preceding Stepfather's adoption petition filing. Abandonment exists when there is such conduct on the part of a parent which evidences a settled purpose to forego all parental duties and relinquish all parental claims to the child. *In re Adoption of M.L.L.*, 810 N.E.2d 1088, 1092 (Ind. Ct. App. 2004) (quoting *In re Adoption of Force*, 126 Ind. App. 156, 161, 131 N.E.2d 157, 159 (1956)).

Father was in Jordan in the six months immediately preceding Stepfather's adoption petition filing. The trial court found that Father chose to leave the United States under a voluntary departure order, where he would be able to return to the United States in about a year, instead of taking the chance of staying and being deported, where he would be barred from returning to the United States for a much longer period of time. *See* Appellant's App. p. 13 (Finding No. 19). This finding is supported by the record. The trial court thus concluded that Father's absence due to voluntary departure "in no way constitutes abandonment." *Id.* at 14. Given that Father chose to leave the United States until he gained legal status a little over a year later instead of taking the chance of being deported and being barred from returning to the United States for ten years, we agree with the trial court that Father's actions do not constitute abandonment. In fact, Father's election of voluntary departure shows that he was doing what he had to do to ensure that he could maintain a relationship with L.H. The trial court did not clearly err

by concluding that Father did not abandon L.H. for at least six months immediately preceding Stepfather's adoption petition filing.

II. Communication

Stepfather next asserts that the trial court erred by concluding that he did not prove by clear and convincing evidence that Father failed without justifiable cause, for at least one year, to communicate significantly with L.H. when able to do so. Efforts of a custodian to hamper or thwart communication between parent and child are relevant in determining the ability to communicate. *In re Adoption of T.W.*, 859 N.E.2d 1215, 1218 (Ind. Ct. App. 2006).

Stepfather does not contest that Father communicated significantly with L.H. up until August 2006, during which time the record reveals that Father regularly exercised visitation. Here, the evidence most favorable to the judgment shows that after L.H.'s "emotional breakdown" during an attempted visitation in August 2006, Haney sent Father a letter in September 2006 stating that it was in L.H.'s best interests to discontinue the visits "until such time as she wants to see her father." Father was never told that L.H. wanted to see him. The evidence further reveals that Mother returned Father's two packages, Father left for Jordan under the terms of voluntary departure, and Father believed he was to have no phone contact with L.H.³ Moreover, even if he could call L.H., the return of his packages led Father to believe that Mother would not permit him to

³ Although Stepfather contests the fact that Father was not permitted phone contact with L.H., we examine only the evidence most favorable to the trial court's decision. The dissolution decree, provided in the record, granted Father continued supervised visitation with L.H. "in accordance with the provisions set forth in the provisional order of this Court." Petitioner's Ex. 1 p. 2. Father testified at trial that the provisional order indicated that he was not allowed phone contact with L.H. Tr. p. 113.

speak with L.H. Because this evidence provided justifiable cause why Father failed to communicate, we conclude that the trial court did not clearly err.⁴

Stepfather argues and we agree that the trial court erroneously attributed the suspension of Father's visits as a decision made by Father, Mother, and Haney. The record reveals that, because the visits were causing L.H. such distress, Father suggested giving L.H. "a break," and Haney agreed. Nevertheless, this is harmless error as there is otherwise sufficient evidence to support the trial court's conclusion regarding Father's communication.

Stepfather also argues that the trial court erroneously found that Father tried to visit after Haney suggested that the visitations stop. On direct examination, Haney was asked about Father's attempts to visit:

Q Okay. So in September, did -- even after you wrote your letter about let's stop the visitation, did [Father] want to stop it?

A No.

Q He tried -- did he try more times after that?

A Yes.

Tr. p. 67. Haney's testimony supports the trial court's finding.

Stepfather also argues that the trial court erred by finding that Mother thwarted Father's attempt to contact L.H. through the mail when she returned L.H.'s birthday package. Evidence and reasonable inferences drawn from that evidence support the finding that Mother returned the package and that Mother's actions constituted thwarting.

⁴ In its conclusions regarding Father's communication with L.H., the trial court stated, "A deportation to a foreign country is certainly akin to incarceration." Appellant's App. p. 15. To the extent that Stepfather argues that the trial court erred by likening Father's voluntary departure to incarceration, *see* Appellant's Reply Br. p. 5, we note that this argument does not foreclose the trial court's conclusions that Father's voluntary departure prevented him from significantly communicating with L.H. since he could not exercise supervised visitation while in Jordan, he was not permitted phone contact with L.H., and he believed any mail he sent to L.H. would be returned by Mother.

Stepfather asks us to reweigh the evidence and reassess witness credibility, which we may not do. The trial court did not clearly err by concluding that Father did not fail without justifiable cause, for at least one year, to communicate significantly with L.H. when able to do so.⁵

III. Care and Support

Finally, Stepfather asserts that the trial court erred by concluding that he did not prove by clear and convincing evidence that Father knowingly failed, for at least one year, to provide for the care and support of L.H. when able to do so. A petitioner for adoption must show that the noncustodial parent had the ability to make payments that he failed to make. *M.A.S.*, 815 N.E.2d at 221.

Stepfather argues that the trial court erred by finding that Father consistently paid child support between the dissolution of the marriage and his voluntary departure. The evidence reveals that Father paid \$2100 in 2003, \$2200 in 2004, \$2000 in 2005, \$2000 in 2006, \$200 in 2007, and \$400 in 2008. From 2003 through 2007, Mother was additionally issued \$3754 in tax intercept checks. This evidence is sufficient to support the trial court's finding.

Stepfather also argues that Father did not provide for L.H.'s care and support from 2007 forward. Because Father made no payments between March 2007 and September 2008, we must determine whether he had the ability to pay during any one-year period

⁵ Stepfather weaves his communication and abandonment issues together and cites Indiana Code section 31-19-9-8(b), which 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." Stepfather appears to argue the trial court erred by not concluding that Father had effectively abandoned L.H. in light of his lack of communication with her. *See* Appellant's Br. p. 29. Our conclusion that the trial court did not err by concluding that Father was unable to communicate with L.H. obviates the necessity of addressing this contention.

during this time frame. From June 2007 to September 2008, while Father was in Jordan, he generated no income. Instead of taking a job that paid \$140 monthly, he opted to spend his time trying to gain legal status in the United States and caring for his ailing parents. The trial court did not clearly err by concluding that Father did not knowingly fail, for at least one year, to provide for the care and support of L.H. when able to do so.

Affirmed.

RILEY, J., and CRONE, J., concur.