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IN THE COURT OF APPEALS OF INDIANA

STEPHEN SUMMERS,	)	
	)	
Appellant-Respondent,	)	
	)	
vs.	)	No. 45A05-0701-CV-49
	)	
KENNETH DAVIS and JENNIFER DAVIS,	)	
	)	
Appellees-Petitioners.	)	

APPEAL FROM THE LAKE SUPERIOR COURT
The Honorable Mary Beth Bonaventura, Judge
Cause No. 45D06-0410-AD-151

August 31, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

NAJAM, Judge

STATEMENT OF THE CASE

Jennifer Davis and Kenneth Davis ("the Davises") adopted their niece, K.S., and nephew, M.D. In their Adoption Petition, which the trial court granted, they identified Stephen Summers as K.S.'s father. Summers filed a Trial Rule 60 Motion to Set Aside the Adoption, which the court denied. Summers then filed a Motion to Correct Error, which the court also denied. He appeals and presents four issues, which we restate as follows:

1. Whether the trial court erred by denying his motion to correct error.
2. Whether the trial court erred when it denied Summers the opportunity to make an offer to prove.
3. Whether the trial court erred by ordering Summers to pay the Davises' attorney's fees.

We affirm in part and reverse and remand in part.

FACTS AND PROCEDURAL HISTORY

Jessica Fecht gave birth to K.S. on August 21, 1999, in Joliet, Illinois. Fecht gave birth to a second child, M.D., in November 2000. Fecht had a drug problem, and both children came to live with Fecht's sister and her husband, the Davises.

On October 28, 2004, the Davises filed a Verified Petition for Adoption of K.S. and M.D. Fecht consented to the adoption. The Davises identified Stephen Summers as K.S.'s biological father. The Davises, however, did not have an address for Summers, and Summers had had no contact with K.S. for three years. Summers also had not paid any child support. The Davises published a Legal Notice in the Crown Point Star on

November 18, November 25, and December 2, naming Summers and informing him of their adoption petition.

The trial court held a hearing on the adoption petition on January 28, 2005. Both Davises testified, and the court reviewed the home report, which included a recommendation that the adoption be granted. The court granted the adoptions and issued its Decree at the hearing.

On January 19, 2006, Summers, by counsel, filed his T.R. 60 Motion to Set Aside Default Adoption. Summers alleged that the adoption "was fraudulently obtain[ed]" because the Davises knew where he was and did not provide notice. Appellees' App. at 27. He also claimed that he had paid child support. The Davises sought discovery from Summers and also filed a Motion to Dismiss Summers' T.R. 60 Motion.

The court held a hearing on August 4, and Summers acknowledged that he had never filed with the Putative Father Registry either in Indiana or Illinois. The court issued an order dismissing Summers' T.R. 60 Motion finding that Summers was not entitled to notice of the adoption because he had never established paternity or registered as a putative father.[1] The court further found that Summers' consent to K.S.'s adoption was "irrevocably implied" by operation of statute due to his failure to register. The Davises requested that the court order Summers to pay their attorney's fees, and the court denied that request.

[1] The Davises argue that Summers' T.R. 60 Motion was also time barred. The August 4 Order, prepared by the Davises' counsel, states, "Because the Court dismisses the putative father's motions on the foregoing basis, it does not address the merits of the adoptive parents' argument that the putative fathers' Motions to Set Aside . . . must fail [because] the motions were time-barred pursuant to I.C. 31-19-14-2." Appellees' App. at 53. We likewise do not address that argument.

On September 6, Summers filed a Motion to Correct Error alleging that the court erred by: 1) determining that he was required to register as a putative father; 2) denying him due process when it applied the putative father registry statutes; and 3) permitting the Davises to "state fraudulently that they were unaware of Summers' whereabouts or that he had no contact with his daughter." Id. at 55. The court held a hearing on December 1. When Summers attempted to present testimony, the court stated:

> At this point, I want to hear argument with regard to the Motion to Correct Error[] and I'd like to hear argument. I do not think at this point it's necessary to hear witnesses. The question is: Whether or not when the Order was entered there, in fact, was an error committed, and that's a question of law, it's not a question of fact.

Transcript at 67.

Summers argued that the putative father registry statute did not apply to him because the mother had disclosed his name. Summers attempted to make an offer of proof to support his claim that the Davises committed fraud. The Davises objected, and the court stated that it did not need evidence because "this is . . . strictly a legal issue." Id. at 81. The court then overruled Summers' Motion.

The Davises renewed their request for attorney's fees and presented an affidavit in support of that request. On December 11, the court issued its written order denying Summers' Motion to Correct Error and awarding attorney's fees in the amount of $907 to the Davises' attorney. This appeal ensued.

DISCUSSION AND DECISION

Issue One: Motion to Correct Error[2]

We review the denial of a motion to correct error for abuse of discretion. Benjamin v. Benjamin, 849 N.E.2d 719, 723 (Ind. Ct. App. 2006). The trial court abuses its discretion when its ruling is against the logic and effect of the facts and circumstances before it and its ruling "is without reason or is based upon impermissible reasons or considerations." Id. An abuse of discretion can also occur if the court has misinterpreted the law. French v. French, 821 N.E.2d 891, 895 (Ind. Ct. App. 2005).

A. Applicability of Putative Father's Registry

Summers acknowledges that he never filed with the Indiana Putative Father's Registry, but he argues that the trial court erred in applying those statutes to his case. Our legislature established the procedures in those statutes in 1994 "[i]n an effort to balance the competing interests in adoption." In re Adoption of J.D.C., 751 N.E.2d 747, 749 (Ind. Ct. App. 2001). The purpose of the registry is to determine the name and address of a father where the mother has not disclosed his "name and address" before she executes a consent to adoption. Ind. Code § 31-19-5-3 (2004). The registry also allows a man "who may have conceived a child" to file with the registry in order to receive notice of adoption. Id.

The statutory framework applies to a putative father when: 1) an adoption for a child that the putative father may have conceived is filed; and 2) that child's mother had not disclosed either the father's name or address or both. I.C. § 31-19-5-1. When a

[2] Both parties set out the standard of review for setting aside a judgment, but this appeal was not initiated until the trial court denied Summers' Motion to Correct Error.

putative father has registered within the specified timeframe, he is entitled to notice of the adoption proceedings. I.C. §§ 31-19-5-4; 31-19-5-5; 31-19-5-12. If the putative father does not register, however, he is not. I.C. § 31-19-5-6. A putative father who does not register waives his right to notice, and this waiver "constitutes an irrevocably implied consent to the child's adoption." I.C. § 31-19-5-12. Also, a putative father who has implied his consent to the adoption by failing to register is prohibited from challenging the adoption or establishing paternity. I.C. §§ 31-19-5-13; 31-19-5-14.

This court has upheld the validity of the putative father registry repeatedly. See e.g., In re Adoption of Fitz; 805 N.E.2d 1270 (Ind. Ct. App. 2004), trans. denied; Mathews v. Hansen, 797 N.E.2d 1168 (Ind. Ct. App. 2003), trans. denied; In re Paternity of M.G.S., 756 N.E.2d 990 (Ind. Ct. App. 2001), trans. denied; In re Adoption of J.D.C., 751 N.E.2d at 751; In re paternity of Baby Doe, 734 N.E.2d 281 (Ind. Ct. App. 2000).

Summers contends that the putative father registry statutes should not apply against him because the mother disclosed his name. We have, however, specifically rejected this argument. In In re Adoption of J.D.C, the putative father, Hunter, knew of the mother's pregnancy, but he never registered as a putative father. Id. at 748. After the adoption was finalized, Hunter petitioned the court to set aside the judgment, and his petition was denied. Id. On appeal, Hunter claimed that the court erred by denying his motion to vacate the adoption. Id. "Specifically, he asserts that since his identity was known, there should have been efforts to discover his whereabouts." Id. We rejected his argument:

> In the interest of providing stability and permanence for children, Indiana provides a statutory scheme with a specified time by which a putative father

> must register. Not only did Hunter fail to register within the specified time, he failed to register at all. Such stringent requirements are not punitive but are instead necessary to advance the State's policy interest of establishing early and permanent placement of children into loving and stable homes. Hunter was not entitled to any special notice of the adoption proceeding, as the State has no obligation to assert Hunter's rights for him where Hunter was capable of protecting his interest himself. Thus, the trial court did not err in denying Hunter's motion to vacate the judgment.

Id. at 752.

Here, Summers was aware of Fecht's pregnancy, yet he never asserted his paternity rights. Indeed, he claims to have visited K.S. and paid child support.[3] To the extent he argues that the Davises' knowledge of his identity entitles him to notice, he is simply wrong. Id. See also Mathews, 797 N.E.2d at 1168.[4] Further, the Davises notified Summers by publication on November 18, November 25, and December 2, 2004. Still, Summers took no measures to assert his parental rights until he filed his T.R. 60 Motion to Set Aside Default Adoption on January 19, 2006. The trial court applied the putative father statutes to this case and found that Summers' consent to K.S.'s adoption was irrevocably implied. That ruling is a correct interpretation of the law based on the facts and circumstances of this case. Thus, the court did not abuse its discretion when it denied Summers' Motion.

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[3] Summers never presented evidence to support these claims either during discovery or at the hearings on his T.R. 60 Motion. His attempt to make an offer of proof of this evidence at the hearing on his Motion to Correct Error is addressed in Issue Two.

[4] Although we held in Mathews that the putative father's motion to set aside the adoption was time-barred, we also specifically rejected the putative father's argument that his lack of notice—where his identity was known—could serve as a basis to attack the adoption decree "after the time limitations [from Indiana Code Section 31-19-14-2] have expired." Mathews, 797 N.E.2d at 1173.

B. Due Process and the Putative Father Registry

Summers also contends that he was denied his parental rights without due process. In In re Paternity of M.G.S., 756 N.E.2d at 1006, this court reviewed and rejected such an argument:

> In Lehr[v. Robertson, 463 U.S. 248, 257 (1983)], the U.S. Supreme Court ruled that due process for unwed fathers requires that state law provide an adequate opportunity for them to claim paternity and take responsibility for their children in a timely manner. 463 U.S. at 264. The Supreme Court recognized that limits on procedural protection for a putative father are necessary from the standpoint of the child, who needs a stable start in life. Id. Here, Wachowski had it within his own power to assert his rights and obtain an opportunity to be heard by filing for paternity within the thirty-day statutory time limit. His own failure to act on the notice given to him deprived him of the opportunity to be heard. Thus, he was given an adequate opportunity to assert his parental rights, and his consent to adoption was implied only as a result of his failure to grasp that opportunity by not filing for paternity within the requisite time period. We, therefore, conclude that the implied consent provision of Indiana's adoption statutes do not violate the constitutional right to due process.

Summers cites to Lehr for the principle that unwed fathers who actively participate in their child's rearing are entitled to substantial protection of their paternity rights. Summers essentially argues that he is entitled to substantial protection because he was involved in K.S.'s rearing.

Summers' argument continues that the trial court never allowed him "to present evidence of significant contact with his daughter as well as payments he made to her mother and grandmother which [sic] he believed were going for her support." Appellant's Brief at 11. This argument, however, ignores the fact that he was given the opportunity to present evidence at the hearings on his T.R. 60 Motion, but he did not. He also never produced documents during the discovery process to support his claims that he

paid child support for K.S., provided health insurance for her, or established his paternity. Even at the hearing on his Motion to Correct Error, Summers told the court that he did not have the documents to support his claim that he paid child support for K.S.

More importantly, though, Summers never established his paternity or registered as K.S.'s putative father. The putative father in In re Paternity of M.G.S. had received actual notice of the adoption proceedings and failed to take steps to assert his parental rights. Id. at 995. Under those circumstances, we held that the putative father registry statutes did not violate his due process rights because he received an adequate opportunity to protect his parental rights. Id. at 1006.

Here, Summers had knowledge of K.S.'s birth, and he failed to either establish paternity or register as her putative father. The Davises published notice,[5] and Summers never appeared to contest the adoption. He also was offered the opportunity to present evidence in support of his T.R. 60 Motion, but he did not. We hold that under these circumstances, Summers was offered all the process necessary to protect his parental rights. Thus, the implied consent provision of Indiana's adoption statutes do not violate his constitutional right to due process. The court did not abuse its discretion when it denied Summers' Motion to Correct Error based on that claim.

Issue Two: Offer of Proof

Summers contends that the trial court committed reversible error when it denied him the opportunity to make an offer of proof during the hearing on his Motion to Correct Error. A party has a right to make an offer of proof when the trial court excludes

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[5] The court never ruled on the adequacy of that notice, and the Davises do not argue that the publication constituted sufficient notice to Summers.

evidence. Nelson v. State, 792 N.E.2d 588, 594-95 (Ind. Ct. App. 2003), trans. denied. Under some circumstances, the trial court's denial of the opportunity for a party to make an offer of proof can be reversible error. Id. Reversal may be required where the trial court limits a party's ability to place information in the record that is necessary to preserve appellate review of an "allegedly erroneous exclusion of evidence." Id. In other circumstances, however, the court's abuse of discretion in denying a party the opportunity to make an offer of proof can be harmless. Id. at 596 (harmless error to deny offer of proof because excluded testimony was "mere surplusage").

Here, the court did not exclude any evidence. Indeed, Summers' attempt to make an offer of proof occurred outside the context of an evidentiary hearing. Thus, there is no admissibility issue to be reviewed. The court explained that the only issue relevant to Summers' motion was legal because the application of the putative father registry statutes to his case negated any evidentiary claims. And the court was correct.

> A putative father whose consent to adoption is irrevocably implied under section 15 of this chapter is not entitled to contest:
> (1) the adoption; or
> (2) the validity of the putative father's implied consent to the adoption.

I.C. § 31-19-9-16. See also Mathews, 797 N.E.2d at 1171 ("That is, this statute specifically precludes Mathews from contesting the adoption decree, even if notice of the adoption had not been given to the child's putative father, whom Mathews alleges to be."). Consequently, Summers cannot demonstrate that his offer of proof to support his claim of fraud was relevant or appropriate at the hearing on his Motion to Correct Error. Thus, any resulting error from the court's denial of Summers' request to make an offer of proof is harmless. Id. at 596

Issue Three: Attorney's Fees

Finally, Summers contends that the court abused its discretion when it ordered him to pay the Davises' attorney's fees in the amount of $907. Generally, attorney's fees are not recoverable from the opposing party as costs, damages, or otherwise, "in the absence of an agreement between the parties, statutory authority, or rule to the contrary." Hill v. Davis, 850 N.E.2d 993, 996 (Ind. Ct. App. 2006) (quoting Swartz v. Swartz, 720 N.E.2d 1219, 1223 (Ind. Ct. App. 1999)). Summers concedes that the court had the authority to impose attorney's fees under Indiana Code Section 31-14-18-2.[6] He also does not contest the amount of the award. His claim on appeal is that the court abused its discretion in awarding attorney's fees without evidence concerning the parties' respective economic situations.

A trial court's decision as to the amount of an attorney's fee award is reviewed under an abuse of discretion standard and will only be reversed where an abuse of that discretion is apparent from the record. Hill, 850 N.E.2d at 996. An abuse of discretion occurs when the trial court's award is clearly against the logic and effect of the facts and circumstances before the court. Id. When the trial court awards attorney's fees, it must

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[6] That statute reads, in pertinent part:

(a) The court may order a party to pay:

> (1) a reasonable amount for the cost to the other party of maintaining an action under this article; and
> (2) a reasonable amount for attorney's fees, including amounts for legal services provided and costs incurred, before the commencement of the proceedings or after entry of judgment.

(b) The court may order the amount to be paid directly to the attorney, who may enforce the order in the attorney's name.

I.C. § 31-14-18-2.

consider the resources of the parties, their economic condition, the ability of the parties to engage in gainful employment and to earn adequate income, and such factors that bear on the reasonableness of the award. A.G.R. ex rel. Conflenti v. Huff, 815 N.E.2d 120, 127 (Ind. Ct. App. 2004), trans. denied.

Here, the court did not hold an evidentiary hearing on the attorney's fee issue, and there is no indication that it considered the parties' resources, economic condition, or other factors that would bear on the reasonableness of the award of attorney's fees. When it awarded attorney's fees without such a hearing, the trial court abused its discretion. Allen v. Proksch, 832 N.E.2d 1080, 1103 (Ind. Ct. App. 2005). Thus, we reverse the portion of the court's order that Summers pay the Davises' attorney's fees in the amount of $907 and remand for a hearing for the court to consider the necessary factors bearing of the reasonableness of the award.

In summary, the trial court correctly denied Summers' Motion to Correct Error and it did not commit reversible error when it denied Summers' the opportunity to make an offer of proof. The court, however, abused its discretion in awarding attorney's fees, and we reverse that portion of its order.

Affirmed in part and reversed and remanded.

MATHIAS, J., concurs.

FRIEDLANDER, J., concurs in part and dissents in part with separate opinion.

IN THE
COURT OF APPEALS OF INDIANA

STEPHEN SUMMERS,	)	
	)	
Appellant-Respondent,	)	
	)	
vs.	)	No. 45A05-0701-CV-49
	)	
KENNETH DAVIS and JENNIFER DAVIS,	)	
	)	
Appellees-Petitioners.	)	

FRIEDLANDER, Judge, concurs in part and dissents in part

I agree with the Majority in all respects except for its reversal of the award of attorney fees. It is clear from the material before us that Summers's lack of cooperation drove up the Davises' legal costs. Moreover, in the context of the amount of legal representation that was obviously required in this case, the amount of attorney fees awarded, i.e., $907, is simply too low to quibble about. I would affirm that award.