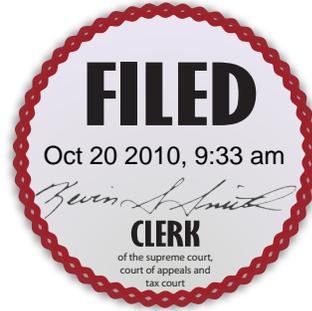


Pursuant to Ind. Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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**IN THE
COURT OF APPEALS OF INDIANA**

IN RE: THE MATTER OF ADOPTION OF)
K.M.A.,)
)
RICK ROBINSON,)
)
Appellant-Respondent,)
)
v.)
)
ADOPTIVE PARENTS,)
)
Appellees-Petitioners.)

No. 29A02-1003-AD-499

APPEAL FROM THE HAMILTON SUPERIOR COURT
The Honorable Steven R. Nation, Judge
Cause No. 29D01-0902-AD-271

October 20, 2010

MEMORANDUM DECISION – NOT FOR PUBLICATION

BAKER, Chief Judge

Appellant-respondent Rick Robinson, who is K.M.A.'s biological father, appeals the trial court's adoption order that was granted in favor of the appellees-petitioners, the adoptive parents of K.M.A. Robinson argues that the adoption order must be set aside because the trial court erred in denying his request to withdraw certain admissions that were deemed admitted, and that the adoptive parents' motion for summary judgment and a motion to dismiss his challenge to the adoption should not have been granted. Finally, Robinson maintains that the trial court should have dismissed the adoption proceedings because of improper venue. Concluding that the trial court properly dismissed Robinson's motion to contest the adoption and finding no other error, we affirm.

FACTS

K.M.A. was born on December 10, 2007, in Fort Wayne to biological mother and Robinson. Although Robinson and biological mother were not married, Robinson's paternity was established. On February 27, 2009, biological mother executed a "Waiver of Notice and Consent" for K.M.A.'s adoption. Appellant's App. p. 5-10.

At some point, attorney Steven Kirsh—a resident of Hamilton County—was appointed K.M.A.'s guardian to authorize the child's "out-of-state placement upon compliance with the Interstate Compact for the Placement of Children." Appellees' App. p. 10. Kirsh consented to the adoption and waived further notice of the adoption proceedings.

Robinson, who was incarcerated at the Westville Correctional Facility (Westville), was served with notice of the adoption proceedings on February 27, 2009. When the

petition for adoption was filed, biological mother and the adoptive parents stipulated to venue in Hamilton County.

On March 12, 2009, Robinson filed a motion to contest the adoption, alleging that he has “maintained a more than adequate level of contact with [K.M.A.] . . . and has correspondence as proof.” Id. at 28. Thus, Robinson maintained that his consent to the adoption was required.

On April 6, 2009, the adoptive parents served requests for admissions and interrogatories upon Robinson. The adoptive parents also filed a motion to depose Robinson, which the trial court granted. Robinson acknowledged the discovery requests, moved for the appointment of counsel, and requested an enlargement of time to respond to discovery. The trial court appointed counsel for Robinson and electronic versions of the adoptive parents’ discovery requests were provided to Robinson’s attorney. Robinson’s appointed counsel made two trips to Westville to discuss and review the discovery responses. Although Robinson’s counsel explained that responses to the discovery were necessary, Robinson refused to cooperate and did not respond to the discovery requests.

In a telephonic status conference that was conducted on July 7, 2009, the trial court ordered Robinson to fully and completely answer interrogatories and the requests for admissions by July 17, 2009. The trial court’s order indicated that Robinson’s failure to properly answer the discovery requests could result in sanctions, including the dismissal of his motion to contest the adoption.

Robinson failed to answer the discovery requests and on July 23, 2009, the adoptive parents filed a motion for summary judgment, and in the alternative, a motion to dismiss Robinson's challenge to the adoption. The adoptive parents alleged that they were entitled to an order dismissing Robinson's motion to contest the adoption in light of Indiana Code section 31-19-10-1.2(g), which states that "If a court finds that the person who filed the motion to contest the adoption is failing to prosecute the motion without undue delay, the court shall dismiss the motion to contest with prejudice, and the person's consent to the adoption shall be irrevocably implied."

The adoptive parents also asserted that they were entitled to summary judgment in light of Robinson's "designated admissions." Appellees' App. p. 16. These admissions included averments that Robinson is unemployed and a convicted felon who is serving a prison sentence and would not be released from prison until 2018 at the earliest. It was also asserted that Robinson's prior convictions included intimidation, confinement, unlawful possession of a firearm, possession of cocaine, and dealing in cocaine. Moreover, it was averred that Robinson has used methamphetamine, marijuana, and cocaine in the last six months.

As a result of the above, the adoptive parents alleged that Robinson is unfit to be a parent to K.M.A. and that the "best interests of [K.M.A.] would be served if the Court dispensed with . . . Robinson's consent to the adoption. . . ." Id. at 17.

The trial court granted Robinson until August 6, 2009, to respond to the adoptive parents' motions. In the meantime, Robinson's counsel moved to withdraw his

appearance, and the trial court conducted a status conference on August 14, 2009. Substitute counsel was appointed, and Robinson was granted until November 19, 2009, to respond to the adoptive parents' pending motions.

On November 19, 2009, Robinson filed a motion to dismiss, claiming that Hamilton County was not the proper venue for the adoption proceedings. The adoptive parents objected, claiming that Robinson filed the motion to dismiss the proceedings as a "delay tactic . . . for Robinson to drag out [the] proceedings." Appellant's App. p. 83. The adoptive parents noted that while Robinson had filed a number of motions, he did not challenge venue "until the 11th hour." *Id.* at 83-84. Moreover, the adoptive parents pointed out that Kirsh was appointed as the placing agency for K.M.A. When the adoption petition was filed, biological mother and the adoptive parents stipulated that Hamilton County was the proper venue for the adoption proceedings.

Following a hearing on the adoptive parents' motions on December 23, 2009, Robinson responded to the discovery requests but declined to answer nineteen of the thirty-one interrogatories. Robinson also did not answer fifteen of twenty-two requests for admissions. More specifically, Robinson refused to admit or deny that he has multiple felony convictions, that he has been convicted of dealing in cocaine, burglary, and criminal confinement. Certified court records showed that Robinson had been convicted of the drug charges in 1990 and was sentenced to ten years of incarceration. It was also established that Robinson was convicted of burglary in 1996, and was sentenced to an executed term of eight years. Robinson was also sentenced to a term of twenty-

eight years following his convictions in 2008 for criminal confinement, intimidation, two counts of possession of a controlled substance, and possession of a firearm by a serious violent felon.

On February 9, 2010, the trial court denied Robinson's motion to dismiss and his request to have the deemed admissions withdrawn. The trial court also granted the adoptive parents' motion to dismiss Robinson's challenge to the adoption, concluding that Robinson "failed to prosecute his Motion to Contest [the Adoption] without undue delay." Appellant's App. p. 139. The trial court observed that Robinson caused undue delay by failing to comply with its orders and the Indiana Trial Rules. Moreover, the trial court concluded that Robinson's continued failure to fully and completely respond to the discovery requests demonstrated that his behavior was purposeful because Robinson knew that he was required to respond to discovery before his motion to contest the adoption would be set for hearing.

Additionally, the trial court noted that Robinson failed to demonstrate that withdrawal of the deemed admissions would subserve the presentation of the merits of the case. Because the above-cited admissions were deemed admitted, the trial court determined that K.M.A.'s best interest would be served if it dispensed with Robinson's consent to the adoption. Thus, the trial court granted the adoptive parents' motion for summary judgment and concluded that Robinson is "unfit to be a parent to [K.M.A.] and . . . [K.M.A.'s] best interests . . . would be served by dispensing with Robinson's consent to the adoption." Id. at 143. Robinson now appeals.

DISCUSSION AND DECISION

I. Deemed Admissions

Robinson argues that the trial court erred in denying his motion to withdraw the deemed admissions. Specifically, Robinson contends that the trial court's refusal to withdraw the admissions denied him the opportunity to contest K.M.A.'s adoption. Robinson asserts that his incarceration and his difficulty with appointed counsel constitute the reasons for the deemed admissions, and he argues that no prejudice would have inured to the adoptive parents had the trial court permitted the withdrawal of the admissions.

Under Trial Rule 36, the failure to respond in a timely manner to a request for admissions causes those matters to be admitted and conclusively established by operation of law. City of Muncie v. Peters, 709 N.E.2d 50, 54-55 (Ind. Ct. App. 1999). Although an admission is ordinarily binding on the party who made it, "there is room in rare cases for a different result, as when an admission no longer is true because of changed circumstances or through honest error a party has made an improvident admission." Gen. Motors Corp. v. Aetna Cas. & Sur. Co., 573 N.E.2d 885, 889 (Ind. 1991).

Indiana Trial Rule 36(B) permits a party to withdraw deemed admissions when the presentation of the merits of the action will be subserved and the party who obtained the admissions fails to satisfy to the court that withdrawal will prejudice that party in maintaining the action. Corby v. Swank, 670 N.E.2d 1322, 1326 (Ind. Ct. App. 1996). A

trial court's grant or denial of a motion to withdraw admissions will be reversed only for an abuse of discretion. Gen. Motors Corp., 573 N.E.2d at 889.

In this case, while Robinson maintains that his incarceration and his difficulty with appointed counsel are the reasons for his failure to answer the discovery requests, the record shows that Robinson was represented by counsel during the time that the responses were due. Moreover, as discussed above, Robinson's counsel made at least two trips to Westville to discuss and review the discovery requests with Robinson. Appellant's App. p. 61-63. Robinson failed to cooperate with his attorney and ignored his advice by not responding to the requests for admission. Id. at 61. Robinson did not seek to have the admissions withdrawn until December 23, 2009, which was five months after the adoptive parents filed their motion for summary judgment.

Our review of the record shows that Robinson has disregarded every deadline that the trial court set regarding his discovery responses. And Robinson has not advanced any reason to suggest that he will cooperate with the discovery process if he is permitted to withdraw the deemed admissions. In light of these circumstances, we cannot say that the trial court abused its discretion in denying Robinson's request to withdraw the deemed admissions.

II. Motion for Summary Judgment

Robinson argues that the trial court erred in granting the adoptive parents' motion for summary judgment because the record demonstrates that there were "disputed facts." Appellant's Br. p. 11. Moreover, Robinson argues that the designated evidence fails to

support the trial court's conclusion that he had either abandoned K.M.A., was an unfit parent, or failed to pay support. Thus, Robinson contends that the adoptive parents failed to satisfy the elements of Indiana Code section 31-19-9-8, which sets forth those instances when consent to adoption is not required.

A. Standard of Review

Our standard of review for a trial court's grant of a motion for summary judgment is well settled. Summary judgment is appropriate only where there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Ind. Trial Rule 56(C); Heyser v. Noble Roman's, Inc., 933 N.E.2d 16, 18 (Ind. Ct. App. 2010). All facts and reasonable inferences drawn from those facts are construed in favor of the nonmovant. Id. The party appealing from a summary judgment decision has the burden of persuading this court that the grant or denial of summary judgment was erroneous. Bellows v. Bd. Of Comm'rs of County of Elkhart, 926 N.E.2d 96, 113-14 (Ind. Ct. App. 2010).

B. Robinson's Contentions

In resolving Robinson's claim that the trial court erred in granting the adoptive parents' motion for summary judgment, we initially observe that Indiana Code section 31-19-9-8(a)(11) provides that

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

(11) A parent if

(A) A petitioner for adoption proves by clear and convincing evidence that the parent is unfit to be a parent; and

(B) The best interests of the child sought to be adopted would be served if the court dispensed with the parent's consent.

Although the statute does not provide a definition of "unfit," we note that in In re AAC, 682 N.E.2d 542, 545 (Ind. Ct. App. 1997), this court found the following factors relevant to the issue of a parent's fitness to provide for the child's emotional and physical development: 1) criminal activities; 2) drug and alcohol use; 3) inability to maintain stable housing; 4) inability to maintain steady employment; and 4) the refusal to pay child support. Moreover, it has been held that a trial court need not wait until children are irreversibly harmed such that their physical, mental, and social development is permanently impaired before termination of the parental-child relationship. R.G. v. Marion County Office, Dept. of Family and Children, 647 N.E.2d 326, 328 (Ind. Ct. App. 1995).

In our view, the factors pertaining to Robinson establish that he is unfit to be the parent of K.M.A. As discussed above, it was deemed admitted that Robinson had been convicted of violent offenses and drug crimes, and was serving an executed sentence at Westville until at least 2018. Robinson was not employed and could not supply K.M.A. with necessities, and it was deemed admitted that Robinson had been a user of marijuana, cocaine, and methamphetamine.

In sum, the evidence demonstrated that the best interests of K.M.A. would be served if the trial court dispensed with Robinson's consent to the adoption. As a result, we decline to set aside the grant of summary judgment in favor of the adoptive parents.

III. Motion to Dismiss

Notwithstanding our conclusion above, Robinson also attacks the trial court's alternative basis for granting the adoption. In particular, Robinson claims that the trial court erred in dismissing his motion to contest K.M.A.'s adoption. Robinson maintains that he should be permitted to contest the adoption because the evidence clearly established that he acted in a diligent, prudent, and timely manner in requesting counsel to assist him in the proceedings.

As discussed above, Indiana Code section 31-19-10-1.2(g) provides that a person's consent to an adoption is irrevocably implied and the motion to contest the adoption will be dismissed with prejudice if it is determined that the person who contests the adoption fails "to prosecute the motion without undue delay." We liken this statute to the provisions of Indiana Trial Rule 41(E), which provides that

when no action has been taken in a civil case for a period of sixty [60] days, the court, on motion of a party or on its own motion shall order a hearing for the purpose of dismissing such case. The court shall enter an order of dismissal at plaintiff's costs if the plaintiff shall not show sufficient cause at or before such hearing.

We will reverse a motion to dismiss under Trial Rule 41(E) for failure to prosecute only in the event of a clear abuse of discretion. Belcaster v. Miller, 785 N.E.2d 1164, 1167 (Ind. Ct. App. 2003). An abuse of discretion occurs if the trial court's decision is

against the logic and effect of the facts and circumstances before it. Id. We will affirm if there is any evidence that the supports the trial court's decision. Id.

Several factors are balanced when determining whether a trial court abused its discretion in dismissing a case for failure to prosecute including, but not limited, to: 1) the length of the delay; 2) the reason for the delay; 3) the degree of personal responsibility on the part of the plaintiff; 4) the degree to which the plaintiff will be charged for the acts of his attorney; 5) the amount of prejudice to the defendant caused by the delay; 6) the desirability of deciding the case on the merits; and 7) the extent to which the plaintiff has been stirred into action by a threat of dismissal as opposed to diligence on the plaintiff's part. Id.

In this case, the record establishes that Robinson exerted virtually no effort in prosecuting his challenge to the adoption. To summarize, in the ten months since Robinson filed his motion to contest the adoption, he:

- Filed four motions to extend deadlines;
- Delayed responding to discovery for 8 months after it was served;
- Provided disingenuous objections in order to delay responding to that discovery;
- Delayed responding for 5 months after court had ordered him to do so;
- Delayed responding for 5 months after a motion for summary judgment was filed;
- Caused the cancellation of his deposition because of his failure to respond to discovery;
- Did not send out any discovery of his own;
- Caused the withdrawal of one of his attorneys because he failed to cooperate.

Also, while Robinson originally completed and signed the requests for admission on July 14, 2009, he did not forward those responses to the court or to opposing counsel for nearly five months. During that time period, Robinson filed five separate motions and he personally appeared before the trial court.

Under these circumstances, we must conclude that the trial court properly dismissed Robinson's motion to contest the adoption because he "failed to prosecute the motion without undue delay." I.C. § 31-19-10-1.2(g).

IV. Venue

Finally, Robinson argues that the trial court erred in denying his challenge to venue. Specifically, Robinson claims that there is no statutory reason for this case to have been heard in Hamilton County, and it "was someone's desire to move this adoption to a location where it would be extremely difficult, if not impossible, for [Robinson] to properly contest." Appellant's Br. p. 28.

We review the denial of a motion to transfer venue under an abuse of discretion standard. Halsey v. Smeltzer, 722 N.E.2d 871, 872 (Ind. Ct. App. 2000). We will find an abuse of discretion if the trial court's decision is clearly against the logic and effect of the facts and circumstances before it, or if the trial court has misinterpreted the law. Id.

Indiana Trial Rule 12(H) provides that the failure to raise the defense of improper venue is waived if it is not made in the responsive pleading. Improper venue is an affirmative defense that is required to be asserted in the responsive pleading under Trial

Rule 8(C). Because Robinson failed to raise the issue of venue in his motion to contest the adoption, he has waived the issue.

Waiver notwithstanding, the provisions of Indiana Code section 31-19-2-3 provide that

(a) An individual who is not a resident of Indiana and who seeks to adopt a hard to place child may file a petition for adoption with the clerk of the court having probate jurisdiction in the county in which the:

- (1) licensed child placing agency or governmental agency having custody of the child is located; or
- (2) child resides.

(b) The county in which a petition for adoption may be filed is a matter of venue and not jurisdiction.

The record shows that the trial court appointed Kirsh, a resident of Hamilton County, as K.M.A.'s guardian. Moreover, Kirsh was named as the "placing agency" for K.M.A.'s adoption under the Interstate Compact for the Placement of Children (ICPC).¹ Thus, the venue requirements of Indiana Code section 31-19-2-3 were satisfied. Finally, as discussed above, when the petition for adoption was filed, the adoptive parents and K.M.A.'s biological mother stipulated that venue would lie in Hamilton County. Appellant's App. p. 3, 7. In light of these circumstances, we conclude that the trial court properly denied Robinson's venue challenge.

¹ Ind. Code § 31-28-4-1 et seq.

The judgment of the trial court is affirmed.

NAJAM, J., and MATHIAS, J., concur.