

Children's Law Center of Indiana



Adoption and Parenting Time

11/17/2014

In E.W. v. J.W., 20 N.E.3d 889 (Ind. Ct. App. 2014), *trans. denied*, the trial court consolidated three causes: (1) Grandmother's petition to adopt the child, to which Father had consented conditioned on the retention of his parental rights, but Mother had not consented; (2) Father's petition to terminate Mother's parenting time; and (3) Father's petition for a permanent protective order against Mother. The Court affirmed the trial court's orders which denied Grandmother's petition for adoption and Father's request to terminate Mother's parenting time. Id. at 892. The Court remanded the trial court's denial of Father's petition for a protection order for further proceedings. Id.

Mother and Father share one child together. On May 12, 2010, Father was granted primary custody of the child due to Mother's issues with drug abuse and her relationship with an abusive spouse. Mother's visitation was restricted to one three-hour visit per week at the Parenting Time Center, and Mother was responsible for the expense of the supervised visitation. The trial court ordered that Mother's child support was limited to one-half of any medical, pharmaceutical, and dental expenses for the child. On November 4, 2011, Mother filed a motion to modify custody and a request for additional parenting time. A hearing was held on Mother's motion, but the trial court denied Mother's request after she failed to submit to a drug test. On April 24, 2012, the trial court ordered that Mother would continue to have one three-hour visitation per week to be supervised by the maternal grandmother. The court also ordered that: (1) neither Mother nor the maternal grandmother could bring gifts to the child unless it was the child's birthday, Christmas, or another holiday; and (2) if Father had a reasonable suspicion that Mother was under the influence of drugs, Father could request that Mother submit to drug testing at her expense up to three times per year. Mother continued visiting the child until September 2012, when Father requested that Mother submit to a hair follicle test. Mother did not comply with Father's request, so Father unilaterally discontinued Mother's visitation and refused to allow any communication between Mother and the child. On October 11, 2012, Father filed a motion to terminate Mother's parenting time. On October 22, 2012, Father filed for and received an ex parte protection order against Mother. On November 5, 2012, Grandmother filed her petition to adopt the child, to which Father consented but Mother did not consent. On November 5, 2012, Mother filed a request to hold Father in contempt for violation of the court's order on Mother's visitation. All of the above causes were consolidated, and a hearing on all matters was held over the course of three days in September 2013. Evidence at the hearing included: (1) Mother was arrested in May 2013 for driving while intoxicated; (2) in the six months preceding the September 2013 hearings, Mother was no longer in an abusive relationship and was drug free; (3) at the time of the hearing, Father had not allowed Mother to see or communicate with the child for an entire year; (4) prior

to Father's decision to deny visitation, Mother made use of a majority of her weekly visitation opportunities going back one year; (5) Mother's visits with the child were largely without incident, and it was clear that the child loved Mother. A DCS case manager testified at the hearing about a CHINS case which was filed in March, 2013 for the child's half-sibling. The caseworker stated that Mother had cooperated with DCS and provide clean drug screens since that time, the child had been returned to Mother, and the CHINS case was set to be closed in November 2013. The trial court denied Grandmother's petition for adoption, concluding that Mother's consent was required, and denied Father's motion to terminate Mother's parenting time. The trial court also denied Father's request for a permanent protection order. Father and Grandmother (Appellants) appealed all three of the trial court's orders.

Appellants argued that Mother's consent to the child's adoption by Grandmother was unnecessary for three reasons: (1) Mother was unfit to be a parent and the best interests of the child would be served if her consent was not required (IC 31-19-9-8(a)(11)); (2) Mother had unjustifiably failed to communicate with the child for a period of at least one year (IC 31-19-9-8(a)(2)(A)); (3) Mother had failed to provide for the care and support of the child for at least one year (IC 31-19-9-8(a)(2)(B)).

The trial court's determination that Mother's consent to adoption was necessary because she was not an unfit parent was not clearly erroneous. *Id.* at 895. Quoting *In Re Adoption of M.L.*, 973 N.E.2d 1216, 1223 (Ind. Ct. App. 2012), the Court said the term "unfit" has been previously defined as "[u]nsuitable; not adapted or qualified for a particular use or service" or "[m]orally unqualified; incompetent," as defined in Black's Law Dictionary 1564 (8th ed. 2004). *E.W. v. J.W.* at 894. Appellants argued that Mother's history of drug abuse, relationships with abusive men, and past involvement with DCS were clear and convincing evidence of Mother's unfitness. The Court looked to termination of parental rights cases for guidance, and noted that in termination cases, the trial court must judge a parent's fitness to care for his or her children at the time of the hearing, taking into account evidence of changed conditions and balancing any recent improvements against any negative actions in the past. *In Re E.M.*, 4 N.E.3d 636, 643 (Ind. 2014). *E.W. v. J.W.* at 895. The Court noted Mother clearly showed improvement in the six months leading up to the hearing, and was on the right track. *Id.* The Court said the trial court's order recognized Mother's history of drug abuse and the fact that she had not been a good parent; nevertheless, the trial court weighed Mother's recent stability more heavily and concluded the balance fell against finding Mother unfit. *Id.*

The trial court's finding that Mother's consent to adoption was necessary because she had significantly communicated with the child was not clearly erroneous. *Id.* at 897. Appellants argued that Mother's visitation, which was only a few hours per week, should not be considered "significant." The Court noted the trial court's statement that "what is significant and meaningful is in the eye of the beholder", and the trial court's conclusion that the communication was significant under the circumstances. *Id.* The Court observed it was undisputed that Mother's communication with the child increased after May 2011, and said it "would defy logic to allow a long-past one-year period of poor communication to overcome a lengthy period of significant communication that immediately precedes the adoption petition." *Id.* The Court noted that

Father's acts of prohibiting communication between Mother and the child from September 2012 until the date of the hearing were significant. *Id.* Quoting *In Re Adoption of A.K.S.*, 713 N.E.2d 896, 899 (Ind. Ct. App. 1999), *trans. denied*, the Court also noted that “[e]fforts of a custodial parent to hamper or thwart communication between a parent and child are relevant in determining the ability to communicate.” *E.W. v. J.W.* at 896-97. The Court opined that Father's efforts to thwart Mother's communication with the child were inseparably linked to the issue of Mother's communication with the child, and the trial court was correct to consider Father's actions and weigh them in Mother's favor. *Id.* at 897.

The trial court's refusal to dispense with Mother's consent because of her failure to support the child was not clearly erroneous. *Id.* at 897. Appellants contended the trial court erred by finding that Mother's consent to the child's adoption was required when she had failed to support the child for over one year. Appellants' argument was based on IC 31-19-9-8(a)(2)(B), which provides that consent is not required from “[a] parent of a child in the custody of another person if for a period of at least one (1) year the parent...knowingly fails to provide for the care and support of the child when able to do so as required by law or judicial decree.” The Court noted that, based on the parties' child support order, Mother was only responsible for one-half of the child's medical, pharmaceutical, and dental expenses. *Id.* The Court also noted the following evidence in support of the trial court's determination: (1) Father did not point to any evidence that he ever made Mother aware of any expenses; (2) Father “never made an issue of [Mother] providing any assistance” prior to the adoption case; (3) a parent's monetary contribution to a child's care may be counted as support (citing *In Re Adoption of M.B.*, 944 N.E.2d 73, 77 (Ind. Ct. App. 2011)); (4) Mother's efforts to clothe the child and provide him with other necessities were largely hindered by Father's refusal to communicate with Mother and by the court's order prohibiting Mother from giving the child gifts other than on birthdays and holidays. *E.W. v. J.W.* at 897.

The trial court's denial of Father's request to terminate Mother's parenting time was not an abuse of discretion. *Id.* at 898. Father argued the trial court erred by not restricting Mother's parenting time. Father pointed to Mother's history with drug abuse and the testimony of the child's teacher that the child had shown improvement since September 2012, when Father unilaterally discontinued Mother's parenting time and any communication between Mother and the child. The Court noted IC 31-17-4-2, which states that “the court shall not restrict a parent's parenting time rights unless the court finds that the parenting time might endanger the child's physical health or significantly impair the child's emotional development.” *E.W. v. J.W.* at 897. Quoting *D.B. v. M.B.V.*, 913 N.E.2d 1271, 1274 (Ind. Ct. App. 2009), the Court said Indiana has recognized that a noncustodial parent's right to visit her children is a “precious privilege.” *E.W. v. J.W.* at 897. The Court explained that it approaches requests for an outright restriction on parenting time with caution and has interpreted the word ‘might’ in IC 31-17-12-4 to mean that a court may not restrict parenting time unless that parenting time ‘would’ endanger the child's physical health or emotional development. *Id.* at 898. The Court found Father's argument was a “straight-forward request to reweigh the evidence”, and the record supported the trial court's finding that Mother was drug free, was no longer in an abusive relationship, and was receiving mental health treatment. *Id.*

The trial court's order denying Father's request for a permanent protection order did not comply with Indiana Trial Rule 52 (A) so the court remanded for further proceedings on the protective order. Id. at 900. The Court explained that Protection Orders are in the nature of injunctions; therefore, the trial court must make special findings of fact and conclusion thereon in accordance with T.R. 52(A) Id. at 899. The Court noted that the trial court's findings were not sufficient to facilitate appellate review. Id.