Adoption

11/13/02

In **In Re Adoption of Infant Female Fitz**, 778 N.E. 2d 432 (Ind. Ct. App. 2002), the Court reversed the trial court, which had stricken the Ind. Trial Rule 60(B) motion that the putative father had filed after the trial court had found his consent to adoption had been irrevocably implied. The Court held that, on remand, the trial court was required to hold a hearing on the putative father's motion for relief from judgment.

When the putative father and mother ended their relationship, the mother decided to place their unborn child for adoption. The putative father refused to consent, and on Dec. 3, 2000, he and his new wife were served with written notice pursuant to I.C. 31-19-3-1 that he would lose his right to contest the adoption if he did not file a paternity action within 30 days of receiving the notice. The putative father then registered with the Putative Father Registry, but did not file a paternity action. The child was born in Dec. 2000. On Jan. 2, 2001, the adoptive parents filed a petition in Hamilton County to adopt the putative father's child. The next day, thirty-one days after the putative father received the statutory notice, the attorney for the adoptive parents called the putative father to inform him that, because he had failed to file a paternity action, he had lost the opportunity to contest the adoption. The putative father filed a paternity action in White County the same day. On Jan. 5, 2001 he filed a notice contesting the adoption in Hamilton Superior Court, which consolidated the putative father's paternity action with the adoption proceeding. On Jan. 12, 2001 a second attorney entered an appearance on behalf of the adoptive parents. The first attorney's motion to withdraw was granted on Jan. 29, 2001. Evidentiary hearings on the consolidated adoption and paternity petitions were held on Feb. 14th and Feb. 20th, 2001. The adoptive parents did not appear in court. On July 30, 2001 the trial court found that the putative father's consent had been irrevocably implied because he filed his paternity action one day too late. On Nov. 2, 2001 the putative father filed a T.R. 60(B) motion. Attached to the motion was an affidavit stating that on Aug. 24, 2001, the adoptive mother contacted the putative father's current wife to tell her that the adoptive parents had returned the child to the adoption agency on Jan. 15, 2001, upon learning that the putative father was contesting the adoption. At that time, per the affidavit, the adoptive parents informed their attorney (the second attorney, who had filed his appearance on Jan. 12, 2001), that they no longer wanted to contest the putative father's efforts to establish paternity. The adoptive mother stated that she and her husband were not the party opposing the putative father at the February hearings. The T.R. 60(B) motion complained that, at the time of the hearings, opposing counsel either had no clients or was acting against the wishes of his clients. On Nov. 26, 2001, the

adoptive parents' second attorney filed a motion to strike the putative father's T.R. 60(B) motion. On Dec. 12, 2001, the trial court, without a hearing, struck the putative father's motion from the record as being improperly filed. On Dec. 21, 2001, the adoptive parents' first attorney entered an appearance on behalf of a new adoptive couple, filed an amended adoption petition on their behalf, and asked the court to substitute the new adoptive couple for the first adoptive couple. There were indications that the Motion to Substitute had been circulated among the parties and counsel in February 2001, before the evidentiary hearings were held. On Dec. 27, 2001, the trial court granted the Motion to Substitute and entered a decree of adoption in favor of the new adoptive couple.

On remand, the trial court was required to hold a hearing on a motion for relief from judgment that the putative father brought after the trial court found that his consent to the adoption was irrevocably implied; putative father established fraud on the court and made a prima facie showing of a meritorious defense. The putative father contended that the affidavits supporting his T.R. 60(B) motion support the conclusion that the trial court's ruling against him was procured by fraud. Ind. Trial Rule 60(B) states, in pertinent part, that "the court may relieve a party or his legal representative from an entry of default, final order, or final judgment . . . for the following reasons: . . . (3) fraud . . . misrepresentation . . . or other misconduct of an adverse party." The rule also contains a savings clause that allows a court to entertain an independent action to relieve a party from "a judgment, order, or proceeding or for fraud upon the court." T.R. 60(B).

The Indiana Supreme Court recently adopted the analysis used by federal courts in analyzing claims for fraud under T.R. 60(B). There are three ways to attack a judgment on the grounds of fraud on the court pursuant to this rule. Id. at 436 (quoting Stonger v. Sorrell, 776 N.E.2d 353 (Ind. 2002)). The first method is by way of motion under T.R. 60(B)(3). Id. This motion can be based on any type of fraud as long as it is chargeable to an adverse party and has an adverse effect on the moving party. Id. The motion is generally limited to the court in which the judgment was rendered and must be made within a year after the judgment was entered. Id. This is the preferred way to challenge a judgment on grounds of fraud on the court, if the time limits have not expired. Id. The second method is an independent action for fraud on the court, under the savings clause of T.R. 60(B). This method is usually used in situations that don't meet the requirements for a motion under T.R. 60 (B)(3), for example when fraud is not chargeable to an adverse party or when the one year time limit has expired. Id. at 437. The third method invokes the inherent power of the court to set aside its judgment if procured by fraud. The court asserts this power sua sponte, and there is no time limit for these proceedings. Id. Regardless of which method is used to assert a claim of fraud on the court, the party must show an unconscionable plan or scheme was used to improperly influence the court's decision and that such acts prevented the losing party from fully and fairly presenting its case or defense. Id.

Although the putative father's motion was filed within one year of the judgment and in the same court in which the judgment was rendered, the fraud was not chargeable to an

adverse party. It was chargeable to an attorney who may have proceeded in the case against the wishes of his clients. Therefore, the Court construed the putative father's motion as an independent action for fraud on the court. The attorney representing the adoptive parents was not a party to the action. As the agent of those employing him, he stands in their stead. He cannot proceed with a case when his clients tell him they no longer wish to pursue it. Ind. Professional Conduct Rule 1.2(a). The putative father alleged that opposing counsel had no clients when he appeared at the February hearings. The Court acknowledged that this allegation represented an unconscionable plan or scheme that was used to improperly influence the trial court's decision and that these acts prevented the putative father from fairly presenting his case. For this reason, the Court did not agree that the putative father's T.R. 60(B) motion was improperly filed. If the allegations were true, the putative father had established fraud on the court that justified setting aside the trial court's order. Id. at 437.

If he is to prevail on his motion, the putative father must also show a good and meritorious defense. Id. (quoting Nwannunu v.Weichman and Assocs., P.C., 770 N.E.2d 871, 879 (Ind. Ct. App. 2002)). A meritorious defense is one showing that a different result would be reached if the case were decided on the merits. Id. The movant does not need to prove the meritorious defense, but only provide enough admissible evidence to make a prima facie showing of a meritorious defense. Id. The putative father contended that he had a meritorious defense because if the adoptive parents'attorney had dismissed the adoption petition as the adoptive parents had requested, the putative father would have been able to continue with his paternity action. The Court agreed. Under I.C. 31-19-9-17(a), a putative father whose consent is irrevocably implied is not entitled to establish paternity of the child. However, subsection (b) of the statute provides, in pertinent part, that "notwithstanding subsection (a), a putative father who is barred from establishing paternity may establish paternity if: (1) the putative father submits . . . an affidavit prepared by the . . . (B) attorney that served notice . . . upon the putative father under I.C. 31-19-3-1 . . . stating that neither a petition for adoption nor a placement of the child in a proposed adoption home is pending; and (2) the court finds on the record . . . (1) that neither a (A) petition for adoption; nor (B) placement of the child in a prospective adoptive home is pending." Thus, a putative father may proceed with the paternity action if the potential adoption falls through. Id. at 438 (quoting Paternity of M.G.S., 756 N.E.2d 990, 998 (Ind. Ct. App. 2001)). In this case, the putative father's consent was irrevocably implied when he did not timely file his paternity action. He could not establish paternity as long as the adoptive parents' adoption petition was pending. However, if the adoptive parents' adoption petition fell through (through their voluntary decision to dismiss it), the putative father would then be free to establish paternity. Id. at 438.

The trial court may not substitute one adoptive family for another adoptive family, thereby preventing the putative father from establishing paternity under I.C. 31-19-9-17(b). According to the Court, I.C. 31-19-9-17(b) does not contemplate such a substitution as a means of preventing a putative father from establishing paternity. To the

contrary, the statute clearly states that, should the adoption fall through, the putative father is free to establish paternity. Id.

Substituting one adoptive family for another is also not proper pursuant to T.R. 17, which allows for substitution of a real party in interest. Per the Court, a substituted adoptive family is not the true owner of the right to be enforced and is not a real party in interest as contemplated by the rule. Id.

Finally, substitution of one adoptive family for another is not proper pursuant to T.R. 25, which allows for substitution of parties in the case of death, incompetency, or a transfer of interest. None of these circumstances existed in this case. Id.