Adoption

2/18/14

In **In Re Adoption of J.L.J.**, 4 N.E.3d 1189 (Ind. Ct. App. 2014), the Court affirmed the trial court's orders which: (1) denied the paternal Grandmother's (Grandmother's) petitions to adopt her grandchildren (the Twins); (2) denied Grandmother's petitions to remove Guardian as guardian of the Twins; (3) denied Grandmother's petitions to be appointed guardian of the Twins; and (4) found that Father's consent to the Twins' adoption was not required. Id. at 1200. Seventeen-year-old Father met seventeen-year-old Mother at Grandmother's home in Benton Harbor, Michigan in 2008. Since that time, their on-again, off-again relationship has produced four children, including the Twins. In June of 2010, Mother resided in South Bend, Indiana, but was visiting Father in Benton Harbor when she prematurely went into labor with the Twins. Shortly after birth, the Twins were transferred to a better-equipped hospital in South Bend, where they remained for approximately one month. On July 12, 2010, Mother took the Twins home from the hospital, but with four children under two years of age, she had little interest in caring for the Twins. A few weeks later Mother left the Twins with her cousin (Cousin), who also lived in South Bend. Throughout Mother's pregnancy with the Twins and during the first eighteen months of the Twins' lives, Father was incarcerated at various intervals and for different reasons, including a four month stint for battering Mother. In the fall of 2010, Father and Mother removed the Twins from Cousin's care and lived together in South Bend. They soon separated. Father's and Mother's on-again, off-again periods were short and frequent, and, following each break-up, Mother left the Twins with a relative or friend. Between the end of 2010 and September of 2011, the Twins were shuffled among Cousin, Grandmother, the Twins' maternal grandmother, and Mother's former foster mother.

While Father was incarcerated in the Berrien County, Michigan Jail, the St. Joseph County, Indiana probate court issued an order establishing Father's paternity of the Twins on July 6, 2011. The probate court found that "Indiana is the home state of the [Twins,]" and that "Father resides in St. Joseph County, Indiana or has sufficient ties to Indiana." The probate court awarded sole custody to Mother and ordered that the Twins' surnames be changed to that of Mother. Mother was given the discretion to allow parenting time for Father in accordance with the Twins' best interests. Father was ordered to pay $26 per week in child support and $4 per week in arrearages. The Twins spent a significant portion of the summer of 2011 with Grandmother in Benton Harbor, and Mother took them back and forth on several occasions. After hearing a rumor that Father would be incarcerated for five years, Mother began seeking someone to take the Twins on a permanent basis. In August of 2011, Mother picked up the

Twins from Grandmother's home, explaining that she was taking them to South Bend to visit family and would return them in one week. Mother placed the Twins with her former foster mother and demanded that Grandmother mail her their birth certificates and social security cards.

On September 11, 2011, the maternal grandmother met Guardian, and, upon learning that Guardian had been attempting to adopt children for several years, the maternal grandmother told Guardian about the Twins. On September 17, 2011, Guardian drove from her home in Bloomington, Indiana to Mother's home in South Bend. Mother informed Guardian that Father was incarcerated and had only limited contact with the Twins. Mother signed a consent form for Guardian to be the Twins' guardian, and Mother and Guardian also discussed Guardian's adoption of the Twins. Guardian took the Twins to live in her home in Bloomington that day. The Twins have resided with Guardian since that day. On September 29, 2011, Guardian filed petitions with the trial court for appointment as the Twins' guardian and also filed petitions to adopt the Twins. On October 3, 2011, notice of the guardianship hearing was issued to Father. On October 6, 2011, Father received two summons notifying him that Guardian had filed petitions to adopt the Twins. The summons explained, inter alia, that Father had thirty days to file a motion to contest the adoption. On November 15, 2011, the trial court conducted a hearing, which neither Mother nor Father attended, and appointed Guardian as permanent guardian of the Twins pending finalization of an adoption. On December 16, 2011, about one week after his release from jail, Father wrote a letter to the trial court in which he requested that the Twins be placed with Grandmother and that he be granted a six month extension to contest the adoption. On February 16, 2012, Father filed his Motion to contest Guardian's adoption of the Twins. Grandmother moved to intervene in the adoption cases, filed cross-petitions to adopt the Twins, moved to intervene in the guardianship proceedings, and filed motions to remove Guardian as the Twins' guardian. Grandmother also filed motions to be appointed guardian of the Twins. Guardian filed a motion for declaratory or summary judgment, alleging that Father's consent to the Twins' adoption was irrevocably implied due to his failure to contest the adoption within thirty days after receiving notice. Guardian later amended this motion, adding that Father's consent was not required based on his failure to support the Twins.

On January 22 and February 26, 2013, the court conducted a trial on the issues of Father's consent to the adoption, Grandmother's petitions to remove Guardian as the Twins' guardian, and Grandmother's and Guardian's petitions for adoption. On April 19, 2013, the trial court issued an order in which it: (1) concluded that Father's consent to the Twins' adoption was not necessary based on his failure to provide support for the Twins for at least one year and for failing to contest the adoption within thirty days of receiving notice; (2) denied Grandmother's petitions to remove Guardian as the Twins' guardian; (3) denied Grandmother's petitions for appointment as the Twins' successor guardian; and (4) denied Grandmother's petitions for adoption, finding that it would be in the Twins' best interests to be adopted by Guardian. The trial court issued findings of fact and conclusions of law and set a date for the final hearing on Guardian's adoption of the Twins. On June 17, 2013, the trial court signed an order stating that the April 19 order was a final judgment as to all parties. Grandmother and Father filed notices of appeal. The Court of Appeals granted Grandmother's motion to consolidate the guardianship and adoption cases for appeal on July 26, 2013.

The Court found that sufficient evidence supported the trial court's determination that Father's consent to adoption was not required based on his knowing failure to provide care and support for the Twins despite an ability to do so. Id. at 1197. The Court noted the parties did not dispute that Father had never paid any child support. The Court looked to IC 31-19-9-8(a)(2), which states that a parent's consent to the adoption of his child is not required 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 require by law or judicial decree.

Id. at 1194. The Court observed that, although Father testified he was unaware of the paternity determination or that he had been directed to pay support, it is well settled that parents have a duty to support their children regardless of a court mandate to pay. J.L.J. at 1194, citing In Re Adoption of N.W., 933 N.E. 2d 909, 914 (Ind. Ct. App. 2010), *opinion adopted*, 941 N.E.2d 1042 (Ind. 2011). The Court said that Guardian must prove by clear and convincing evidence that Father had the *ability* to support the Twins and failed to do so (emphasis in opinion). J.L.J. at 1195, citing McElvain v. Hite, 808 N.E. 2d 947, 950 (Ind. Ct. App. 2003). The Court observed that, while it is true that Guardian did not offer documentation of Father's financial resources, the Court must consider the totality of the circumstances in determining the ability of the parent to support the child. J.L.J. at 1195. The Court noted the following evidence in support of the trial court's determination: (1) Father claimed that he supported the Twins by purchasing car seats, diapers, and formula; (2) Father was able to afford his own residence in Benton Harbor, and he had funds to purchase cigarettes and travel back and forth between Benton Harbor and South Bend; (3) Father admitted that he intentionally did not pay support based on his belief that he was satisfying his obligation by "taking care of" the Twins; (4) Father clarified that he could work but couldn't play basketball anymore; (5) Father testified that his Social Security disability payments were stopped in April of 2010, based on Social Security's finding that he was *not* disabled (emphasis in opinion.) Id. at 1195-97. The Court held that there was sufficient evidence that Father, although apparently capable of financing his own independent living, failed to provide for the Twins to the best of his ability. Id. at 1197. The Court observed that Father chose not to pursue employment when his disability payments were discontinued for eighteen months, spent only occasional time with the Twins when they were with Mother or Grandmother, and did nothing to ensure that the Twins were consistently equipped with adequate housing, clothing, food, and other necessities. Id. citing In Re Adoption of A.M.K., 698 N.E. 2d 845, 847 (Ind. Ct. App. 1998).

The Court found the trial court did not abuse its discretion in concluding that Grandmother was not entitled to notice of the guardianship proceedings. Id. at 1198. Grandmother claimed that the trial court's appointment of Guardian as the Twins' guardian was invalid because Guardian failed to provide Grandmother with notice of the guardianship petition. The Court looked to IC 29-3-6-1(a)(3), which states that when an individual petitions the court to be appointed guardian over a minor, notice of the petition and hearing must be mailed to any living parent of the minor whose parental rights have not been terminated, "[a]ny person alleged

to have had the principal care and custody of the minor during the sixty (60) days preceding the filing of the petition [,]" and anyone else whom the trial court deems is entitled to notice. Id. at 1197. The Court noted that Father had received notice of the guardianship hearing, but neither he nor Grandmother had attended the hearing. Id. The Court agreed with the trial court's finding that the evidence did not establish that Grandmother had the principal care and custody of the Twins during the sixty days preceding the filing of the guardianship petition on September 29, 2011. Id. at 1197-98. The Court noted the following: (1) the Twins probably spent a great deal of time with Grandmother in Benton Harbor, but they also spent a great deal of time with various relatives and family friends in Indiana; (2) the Twins' Guardian ad Litem agreed that the Twins' placement during the first fifteen months of their lives was "spotty"; (3) Grandmother asserted that the Twins were in her care until August 28, 2011, but the trial court found that Mother had removed the Twins from Grandmother's home by August 1, 2011 and placed them in the care of Mother's former foster mother; (4) even if the Court considered Grandmother's argument that the Twins lived with her until August 28, the Twins would have been in Grandmother's care for less than thirty days of the sixty days preceding the filing of the guardianship petition. Id. at 1198. The Court, quoting Wells v. Guardianship of Wells, 731 N.E. 2d 1047, 1050 (Ind. Ct. App. 2000), *trans. denied*, said that, notwithstanding its determination that Grandmother was not the primary caregiver, the Court had previously established that there is "no authority for the proposition that the failure to comply with the notice requirements of [Indiana Code section] 29-3-6-1 automatically invalidates an appointment of permanent guardianship." J.L.J. at 1198. The Court observed that: (1) at the time she filed the guardianship petitions, Guardian had no basis for knowing that Grandmother was an alleged caregiver; (2) Guardian provided notice to Father; (3) when she picked the Twins up in South Bend, Mother informed Guardian that she had nobody else to take the Twins; (4) because Guardian received the Twins directly from the custodial parent and was given their birth certificates, Social Security cards, and Medicaid cards, Guardian had no indication of Grandmother's involvement; (5) Guardian did not intentionally attempt to conceal the guardianship proceedings from Grandmother. Id.

The Court concluded that the trial court did not err in appointing Guardian as guardian of the Twins because the Interstate Compact on the Placement of Children (ICPC)(IC 31-28-4-1) did not govern Mother's placement of the Twins with Guardian. Id. at 1199. Grandmother claimed that Guardian's guardianship appointment was invalid because the trial court failed to adhere to the requirements of the ICPC. The Court explained that the ICPC facilitates the instate placement of children and resolves jurisdiction issues. Id. at 1198-99. The Court cited IC 31-28-4-1 art. III(a)-(c), which states that, prior to placing a child in a home or childcare institution located in another state, the person or agency in the "sending" state must submit written notice to the appropriate authorities in the "receiving state" to provide information about the child and the proposed placement, as well as the reasons necessitating placement. Id. at 1199. The Court also cited IC 31-28-4-1 art. III(d), which states that the receiving state must notify the sending state "that the proposed placement does not appear to be contrary to the best interests of the child." Id. The Court observed that the trial court had not made any findings of fact or conclusions of law regarding the applicability of the ICPC, but it did find that the Twins have always been residents of the State of Indiana. Id. The Court looked to Article VIII of the ICPC, which specifically states that the ICPC does *not* apply in situations where a parent takes her child into a different state "and leav[es] the child with any such relative

or non-agency guardian in the receiving state" (emphasis in opinion). Id. The Court found that the domicile state of the Twins or the length of time they lived with Grandmother was irrelevant because it was Mother, without agency involvement, nor as the result of a court order, who picked the Twins up in Benton Harbor, drove them to South Bend, and authorized Guardian to take them to Bloomington with a signed consent for their guardianship. Id.

The Court found that there was sufficient evidence that Guardian's adoption was in furtherance of the Twins' best interests. Id. at 1200. Grandmother claimed that the trial court abused its discretion in denying her petitions to remove Guardian and her petitions to adopt the Twins. Grandmother contended that the trial court ignored both parents' indications that they would accept Grandmother as the Twins' adopted mother and failed to weigh Grandmother's familial connection in determining the Twins' best interests. The Court pointed to its previous holding in In Re Adoption of Childers, 441 N.E. 2d 976, 980 (Ind. Ct. App. 1982), that a "[b]lood relationship, while a material factor, is not controlling… Relatives have no preferential legal right to adopt." J.L.J. at 1200. The Court noted the following evidence in support of the trial court's decision: (1) Guardian had been providing the Twins with a loving and stable home where the Twins had their own rooms; (2) the Twins had already resided in Guardian's home for one and one half years, and this is the only stable home they had ever known; (3) the Twins are bonded to Guardian; (4) the Guardian ad Litem testified that the Twins are very well adjusted, receiving excellent services, surrounded by a strong network of family and friends, and it is in their best interests to remain with Guardian. Id. at 1199-1200.