

Children's Law Center of Indiana



ADOPTION

5/25/2018

In **In Re The Adoption of E.M.L.**, 103 N.E.3d 1110 (Ind. Ct. App. 2018), the Court held that the trial court clearly erred when it found that Father failed to support the child for at least a year when able to do so, and when it found that he failed without justifiable cause to communicate significantly with Child for at least a year when able to do so. The Court held that the trial court consequently erred in granting Stepfather's petition to adopt the child, and reversed the granting of the adoption petition.

Father established paternity of the child when the child was approximately two years old; Father was ordered to pay child support and visited with the child when the child was visiting Paternal Grandparents. Mother married Stepfather. In the year after establishing paternity, Father paid only \$620 of the \$3,380 he owed in child support. The record has little information as to Father's employment situation at that time. Father was arrested for dealing in methamphetamine, and Mother was given sole legal and primary physical custody, with no limitations on Father's visitation. Father received an abatement of his child support while he was incarcerated, and spoke with the child by telephone while incarcerated. After his release, Father resumed visitation with the child, and then filed a petition to change his parenting time and to obtain custody, alleging that Mother was preventing his unsupervised contact with the child. Before a hearing was held, Father was arrested for domestic violence, and he pled guilty. His child support was again abated. Mother and Paternal Grandmother frequently communicated, and Mother informed Paternal Grandmother that she no longer wanted the child to talk to Father on the phone due to his behavior. Paternal Grandmother made several requests to allow the child to talk to Father, and Mother refused. When Father was released and moved in with his parents, Mother refused to allow the child to visit but invited Paternal Grandparents to visit the child at her house. Stepfather then filed a petition to adopt the child, which Father contested. In the year before the adoption petition was filed, Father paid \$3,189.74 in child support toward his total obligation of \$3,380, almost all of which was from tax intercepts. In the year before that, Father paid child support weekly. The trial court found that Father's consent was not required because Father had failed to support Child during three separate periods: from December 2011 to December 2012, during his incarceration from January 2013 to August 2014, and from August 2015 to August 2016. The court also found that Father had failed to significantly communicate with Child in the year preceding the filing of the adoption petition. Father, after being excluded from the best interests portion of the hearing, appealed.

The trial court's finding that Father knowingly failed to provide for the child's support during the specified time periods was clearly erroneous; the Court held that (1) Stepfather

failed to show Father had the ability to pay child support for one alleged period of nonpayment; (2) Father’s incarceration and abated child support could not be counted as the second period of alleged nonpayment; and (3) the fact most of the child support for the third period of alleged nonpayment came from tax intercepts could not be held against Father. *Id.* at 1116-17. IC 31-19-9-8(a)(2) provides in part that a parent’s consent to adoption is not needed if the parent of a child in the custody of another person knowingly fails for at least one year to provide for the care and support of the child when able to do so as required by law or judicial decree. Stepfather had the burden of proving that Father knowingly failed to make child support payments when Father had the ability to so pay. *Id.* at 1116. The first period of nonpayment was alleged to be December 2011 to December 2012, when Father paid \$620 in support toward a total annual obligation of \$3,380. *Id.* The Court opined that even if this was a gross underpayment, there was no evidence in the record as to Father’s ability to pay child support during that time. *Id.* “It was not Father’s burden to present evidence explaining why he did not pay the full amount of support; it was Stepfather’s burden to prove that Father was able to pay it.” *Id.* The second period of alleged nonpayment was during Father’s incarceration from March 2013 through July 2014. *Id.* at 1116-17. The trial court’s decision that Father had a duty to pay child support, despite Father’s incarceration and the order abating Father’s child support to zero during this time period was erroneous. *Id.* at 1117. It was also contrary to prior case law, which holds that incarceration may be considered a substantial change in circumstances justifying modification of a child support order. *Id.*, citing *Clark v. Clark*, 902 N.E.2d 813, 817 (Ind. 2009). The final period of alleged nonpayment was between August 2015 and August 2016, when Father paid \$3,189.74 in child support toward his total obligation of \$3,380.00, and all but \$222.00 of that amount was from tax intercepts. *Id.* The Court determined that “the fact that much of the support paid in that time period came from tax intercepts does not mean that it should have been disregarded by the trial court. Such intercepts would constitute support for purposes of any criminal action for nonsupport of a dependent.” *Id.* The Court opined that it did not matter how or in what form the child support was paid, the fact remained that it was paid, and it did not matter that most of it came from tax intercepts. *Id.*

The Court held that the trial court erred when it found that Father failed without justifiable cause to communicate significantly with the child in the year before the adoption petition; the evidence was clear and undisputed that Mother made repeated efforts to curtail and completely terminate Father’s ability to contact or communicate with the child. *Id.* at 1118. IC 31-19-9-8(a)(2) provides in part that a parent’s consent to adoption is not needed if the parent of a child in the custody of another person fails without justifiable cause for at least one year to communicate significantly with the child when able to do so. The Court noted that it was well established law that “Efforts of a custodial parent to hamper or thwart communication between a parent and child are relevant in determining the ability to communicate.” *Id.* at 1117 (internal citations omitted). The Court noted that Mother did not deny the content of the text messages between herself and Paternal Grandmother, where Mother repeatedly refused to allow Father to have any communication with the child. *Id.* at 1118. The Court also noted that Father’s parenting time rights were never curtailed by any court order, and that despite Mother’s commendable desire to protect the child, she had not followed proper procedure to legally limit Father’s time and contact with the child. *Id.* The Court opined that Mother and the trial court

“discounted her clear efforts to hamper communication between Child and Father” and imposed unrealistic extra requirements on Father to seek communication and visitation to which he was already entitled. Id. The Court further held that Father’s failure to fight more aggressively to maintain contact with the child did not equate with lacking justifiable cause failing to communicate or that he was practically able to communicate. Id. “A custodial parent should not be able to unilaterally limit, place conditions on, or completely terminate a noncustodial parent’s parenting time, and then successfully assert in an adoption proceeding that the noncustodial parent was able to communicate with the child but failed to do so without justifiable cause.” Id.