



Adoption

3/25/2020

In **K.F. v. B.P.**, 145 N.E.3d 813 (Ind. Ct. App. 2020) *trans. denied*, the Court affirmed the trial court's decision and held that: (1) Adoptive Parents failed to show that their attorney's continued representation of them in any way prejudiced their case; (2) the trial court did not err in refusing to grant summary judgment on the matter of Father's consent; and (3) the trial court did not err in determining that Birth Parents' consent were not voluntarily and knowingly given.

Mother and Father were fourteen and sixteen when Mother became pregnant. The couple had a son in February 2018, and by August 2018, Mother was pregnant again. Mother and Father, independent of each other, both considered adoption; in May 2019, Father consulted, Francis, a close family friend who was an attorney and the owner of Heartland Adoption Agency. Francis gave Father a packet of information and forms for both Father and Mother to sign, and Father believed Francis was working on their behalf. Mother never met Francis but signed a one-page adoption plan and a "Mother's Notice of Intent to Relinquish Parental Rights and Notice of Intent to Consent to Adoption". Birth Parents eventually met with Francis to get additional information; Francis prepared an emancipation form for Mother, and Grandmother signed it. Francis set up medical appointments for Mother, arranged assistance for both Mother and Father, advised them about Medicaid, and offered to obtain counseling. Adoptive Parents retained Francis to complete an adoption for them, and Francis arranged a meeting between Birth Parents and Adoptive Mother. At a medical appointment for Mother with Adoptive Mother and Father in attendance, Francis gave Father a form titled "Father's Consent to Termination of Parental Rights and Consent to Adoption" and had Father sign it. The terms indicated that the consent was final; however, Francis told Father that they could stop the adoption at any time. Francis did not tell Father about the consequences of signing the consent and did not tell him that he could seek independent legal counsel.

After the baby was born, Adoptive Parents encouraged Father to be sure that he wanted to follow through with the adoption; at this time, no one expressed any reservations. However, shortly thereafter, Mother realized she did not want to go through with the adoption, but the nurses told her she was doing such a nice thing. Birth Parents executed consents for the baby's immediate placement, and a social worker interviewed Mother about the voluntariness of her consent. Her notes indicated that both birth parents "are in agreement with adoption and [the birth mother] does not feel coerced and is not under the influence of medication that would impair her judgment." Mother signed a consent to the adoption, indicating her consent was final. When Adoptive Parents left with the baby, Father attempted to contact Francis to request that the baby be returned to them, as her and Mother changed their minds. Father believed Francis could and would stop the adoption at any time; Father continued to attempt the contact Francis with these requests. Eventually the trial court appointed counsel for Birth Parents and they sought to

withdraw their consents. Heartland filed for summary judgment on the matter of the consents, and Birth Parents opposed this. Francis and his co-counsel represented both the Adoptive Parents and Heartland throughout the trial; all parties were aware during the entire process that Francis could be a potential witness due to his statements to both Mother and Father about the nature and consequences of the consents. Francis was never called as a witness. An expert testified regarding an adolescents' ability to make decisions about how undue influence could look for minors. The trial court ultimately denied the adoption and the termination of parental rights petitions.

Adoptive Parents' attorney's continued representation of them throughout the adoption proceedings did not prejudice their case and did not deprive them of a fair hearing. Id. at 822. Adoptive parents argued that the judgment must be set aside because the trial court erred in permitting Francis to continue to represent them, as Francis was a potential material witness at the trial. Id. at 821. The Court opined that this was an argument that the trial court was obligated to *sua sponte* declare a mistrial; the Court rejected this argument and noted that Adoptive Parents failed to object to his continued representation, and thus, waived the issue. Id. Adoptive Parents' argument was based on Ind. Professional Conduct Rule 3.7, which pertains to a lawyer's inability to act as an advocate at a trial where the lawyer is likely to be a witness, with exceptions. Id. at 822. The Court noted that ultimately, "Francis was never a witness, never sought to be called as a witness, and no one attempted to disqualify him as a witness", and that no objection was ever made. Id. "The trial court could not have determined whether any testimony that Francis might have provided related to an uncontested issue under Prof. Cond. R. 3.7(a)(1), because none was ever offered. That said, the importance of any testimony that Francis might have offered is unclear and only speculative." Id. Generally, in family law, a fair hearing means that the parties are given notice, an opportunity to be heard, and a chance to confront witnesses. Id. Adoptive Parents had these opportunities, and thus, were not prejudiced in any way by their attorney. Id.

The trial court did not err in refusing to grant summary judgment on the issue of Father's consent; there was a genuine issue of material fact as to whether or not Father's consent was valid. Id. at 823. Heartland argued that the designated evidence established as a matter of law that Father executed an irrevocable consent to the termination of the parent-child relationship, and that Father's consent to the adoption "spoke for itself." Id. at 822. The proper issue on a matter of summary judgment is "whether there is a genuine issue of material fact, and whether the moving party is entitled to judgment as a matter of law." Id. In reviewing a summary judgment matter, all factual inferences and doubts are construed in a manner most favorable to the nonmoving party. Id. at 822-23. The Court noted the following evidence: (1) Francis had been a trusted advisor to Father and his family; (2) Father did not seek independent counsel due to Francis's influence; (3) Father was not aware of the conflicts of interests; (4) Father did not understand the forms he signed; (5) Father did not know the consents were final; (6) Father signed the consent form because Francis recommended he do so and because he believed Mother wanted him to do so. Id. at 823. A consent that appears valid is not effective if the consent was not given voluntarily. Id. (internal citations omitted). The Court opined that this evidence showed that there were genuine issues of material fact as to the voluntariness of Father's consent. Id. There were clear issues as to whether the consents were executed as a result of undue influence,

critical misunderstandings about Francis’s role and legal information, and lack of knowledge about the effect of a consent. Id.

It was reasonable for the trial court to conclude that the Birth Parents’ consents were not voluntary, given the evidence in the record. Id. at 825, 826-27. The Court noted that the adoption code is strictly construed in favor of biological parents, and IC 31-19-9-2(a) sets forth requirements for the valid execution of a consent to an adoption. Id. at 824. The statute provides that “consent to adoption may be executed at any time after the birth of the child, either in the presence of: (1) the court; (2) a notary public or other person authorized to take acknowledgements; or (3) an authorized agent of (A) the department; or (B) a licensed child placing agency.” IC 31-19-9-2(a). In order a consent to be valid, the consent must also be voluntary, and must be a consent to the termination of all parental rights. Id. at 824, citing In re Adoption of M.P.S., 963 N.E.2d 625, 629 (Ind. Ct. App. 2012). Consent must be free of all fraud, duress, or other consent-vitiating factors, and must completely of the biological parent’s own volition. Id., citing Bell v. A.R.H., 654 N.E.2d 29, 32 (Ind. Ct. App. 1995). Consent may only be withdrawn within thirty days of signing the consent if the court finds, after notice and an opportunity to be heard, that it is in the best interests of the child for the consent to be withdrawn, and the court so orders it. IC 31-19-10-3(a). The burden of proof for withdrawing consent is clear and convincing evidence and is borne by the person seeking to withdraw the consent. IC 31-19-10-0.5 and -6. IC 31-35-1-6 is a companion statute dealing with consent to a voluntary termination of parental rights; it provides as follows:

- (a) Except as provided in subsection (c), the parents must give their consent in open court unless the court makes findings of fact upon the record that:
 - (1) the parents gave their consent in writing before a person authorized by law to take acknowledgments; and
 - (2) the parents were: (A) advised in accordance with section 12 of this chapter; and (B) advised that if they choose to appear in open court, the only issue before the court is whether their consent was voluntary.
- (b) If: (1) the court finds the conditions under subsection (a)(1) and (a)(2) have been met; and (2) a parent appears in open court; a court may consider only the issue of whether the parent’s consent was voluntary.

In arguing that the parents’ consents were valid and irrevocable, Heartland and the Adoptive Parents relied on Bell v. A.R.H., 654 N.E.2d 29, 32 (Ind. Ct. App. 1995) (adoption case worker specifically told Mother that consents were final, and Mother waited seven months before contesting the adoption). Id. at 824. The Court noted that the facts here were quite different from Bell, specifically highlighting the close family relationship between Francis and Father, the fact Francis misinformed Father that he could withdraw the consent at any time, the large amount of documents Francis provided to Birth Parents, Father’s belief that he could withdraw the consent at any time, the lack of information Francis gave Father about the consequences of signing the consent, that Birth Parents thought Francis was their attorney, the fact Francis never explained the consequences of his representation of Adoptive Parents to Birth Parents, that Francis never told Birth Parents to consult their own lawyer, and the amount of other assistance Francis provided to Birth Parents. Id. at 825. The Court concluded that rather than directing Birth Parents towards an attorney who could advise them about all available options, Francis used his particular influence with Father to steer Birth Parents towards adoption. Id. The evidence also

showed that while Mother was signing forms at the hospital, Mother felt herself to be under extreme pressure and just wanted the pressure to stop. Id. Adoptive Parents attempted to rely on Matter of Adoption of Hewitt, 396 N.E.2d 938 (Ind. Ct. App. 1979) (affirming denial of petition to withdraw consent; claim of shame from family alone was insufficient to show consent was not voluntary; biological mother did not claim she did not understand consequences of consent, and in fact, was advised of consequences repeatedly). Id. at 826. The Court opined the facts here were different as well, noting the Birth Parents were not in fact advised of consequences, that Father had a preexisting relationship with Adoptive Parents' attorney, and the misunderstanding about who Francis was representing. Id.

The Court noted that the most instructive case was In re Adoption of M.P.S., Jr., 963 N.E.2d 625, 630 (Ind. Ct. App. 2012), which held that a birth mother's consent was not voluntary, because she signed it without knowing essential facts regarding the adoption. Id. at 826. The M.P.S. birth mother executed the consent believing it could be revoked later, and this belief was based on what the adoptive parents' attorney told her. Id., M.P.S. at 629-30. "We observed that '[e]ven if we assume that Mother's execution of the consent was not a product of threats and coercion, her consent is nevertheless involuntary where she was assured it was revocable and she did not intend to relinquish contact with her child.'" Id., M.P.S. at 629-30. The K.F. Court ultimately opined that given the prior case law and the facts, it was reasonable for the trial court to conclude that Birth Parents' consents were not voluntary; they lacked crucial information, and there was evidence of undue influence. K.F. at 826-27.