

Children's Law Center of Indiana



Adoption

8/19/2014

In **In Re Adoption of M.H.**, 15 N.E. 3d 612 (Ind. Ct. App. 2014), the Court affirmed the trial court's order which granted Foster Parents' petition for adoption, denied Relatives' petition for adoption, and ordered Relatives to part with the child. The child was born on April 9, 2012. The identity of the child's father was unknown. Mother tested positive for cocaine, opiates, and THC at the time of the child's birth, and the child tested positive for cocaine and THC. On April 12, 2012, a CHINS petition was filed for the child, and she was placed in a foster home. On May 4, 2012, Foster Parents filed a Motion for Placement of the child. On May 9, 2012, the child's maternal great aunt (Aunt) requested placement of the child. Foster Parents filed their petition to adopt the child on May 10, 2012. Aunt filed her petition to adopt the child on June 1, 2012. On June 1, 2012, the trial court held a CHINS hearing on the child in a separate cause, and ordered split custody placement of the child between Foster Parents and Aunt. On August 30, 2012, Aunt and her adult daughter, the child's cousin (Cousin) (hereinafter Relatives) filed an amended petition to adopt the child, and their adoption case was consolidated with Foster Parents' adoption case. On January 16, 2013, the Vanderburgh Superior Court terminated Mother's parental rights. DCS recommended Relatives as the child's adoptive family.

Foster Parents reside in Evansville, and at the time of the adoption hearings, Foster Father was 50 years old, was a retired law enforcement officer, and worked at a work release facility. At the time of the adoption hearings, Foster Mother was 52 years old and operated an in home licensed day care, with an average of four to six children present each day. Foster Parents, who have college educations, were married in 2007. Foster Mother has three birth children of her own living at the residence. In addition, Foster Parents have adopted five children. Three of these children, ages 6, 4, and 2, are biological half-siblings to the child, and a fourth child is a biological cousin to the child. Relatives are Aunt, who is unmarried, works full time, lives alone in Boonville in a four bedroom house, and who was 62 old at the time of the adoption hearing, and Cousin, who was 33 years old at the time of the adoption hearing, is unmarried, and lives in Evansville with her two children, ages 10 and 11 years.

In June 2013, one of Foster Parents' children was believed to have cancer. During this time, Foster Parents did not see the child and were unsure whether they would be able to pursue their adoption of the child. Foster Parents gave a letter to Relatives: (1) instructing them not to return the child to Foster Parents' residence, (2) stating that they had decided not to follow through with their adoption petition, (3) indicating that they desired an agreement for visitation with the child,

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and (4) asserting that the child would resent Relatives for removing her from the household of her siblings and that she would join their family when she was an adult. Foster Parents also had each of their children write letters to the child and to Aunt and later gave the letters to Aunt. The children's letters expressed negative statements to Aunt, stating that they despised her and that she was taking the child away from her siblings. Relatives had the child exclusively after June 24, 2013. It was later found that Foster Parents' child's tumor was not cancerous. On July 22, 2013, Foster Parents filed a Motion to Resume Court Ordered Placement Schedule in the CHINS case, and also appeared at one of the CHINS hearings and requested the court to reinstate the prior visitation schedule. The court denied Foster Parents' request to implement the prior schedule.

The trial court heard evidence on the two adoption petitions on May 30, August 13, and August 20, 2013. During the presentation of evidence on May 30, upon returning from lunch, the trial court judge advised the parties that he had received an email from a fraternity brother supporting the child's adoption by Foster Parents. The judge explained to the parties and their attorneys that: (1) he had not read all of the email, but he had read enough to know that it supported Foster Parents on their adoption petition; (2) he was told by counsel that the fraternity brother's daughter had also emailed the judge a week prior about the adoption; (3) he and the fraternity brother were fraternity members for about a year and a half in the 1980's; (4) he could not think of the last time he saw the fraternity brother, but thought that their last meeting was at the annual picnic one or two years previously. The judge suggested that the parties speak with their attorneys on whether they wished to make a motion to remove him. Relatives moved to have a neutral judge appointed to hear the case. The trial court denied Relatives' motion. On October 13, 2013, the trial court issued its order with findings and conclusions granting Foster Parents' adoption petition and ordering Relatives to part with the child. Among the findings and conclusions were: (1) the court is unconvinced that the factor of being distantly related should be given significant weight in determining the child's best interest; (2) Foster Parents have adopted three of the child's half-siblings and the child's cousin, who are far more closely related to the child than anyone associated with Aunt; (3) the court believes that the sibling relationships and their significance strongly favored Foster Parents' adoption; (4) Aunt will be 79 years old when the child reaches the age of 18, and even though Aunt has Cousin as a back-up, it is not the best plan for someone else to parent a child for health reasons; (5) Foster Father has had significant heart problems, which have been treated, but his health is a huge concern; (6) the court believes that all of petitioners have an adequate home and resources to raise the child; (7) the attachment and caring factor favored Relatives; (8) the child would be an only child to Aunt so she would receive a lot of undivided attention; (9) there would be little undivided attention from Foster Parents compared to what the child would receive from Aunt. The court concluded it could not overlook that Foster Parents' family is closer in age, bigger in numbers, and should last longer without interruption compared to Relatives. The court said that it hoped that Foster Parents would allow Relatives to have some contact with the child, but would not order contact.

The Court concluded that the trial court did not abuse its discretion when it denied Relatives' Motion to Recuse. *Id.* at 625. Citing Bloomington Magazine, Inc. v. Kiang, 961 N.E. 2d 61, 63 (Ind. Ct. App. 2012), the Court observed that a ruling upon a motion to recuse rests

within the sound discretion of the trial judge and will be reversed only upon a showing of abuse of that discretion. M.H. at 622. “In order to overcome that presumption, the appellant must demonstrate actual personal bias.” Bloomington Magazine at 64. M.H. at 622. Relatives argued that the denial of the Motion to Recuse was contrary to Rules 1.2, 2.4, 2.9, and 2.11 of the Code of Judicial Conduct, and it created the appearance of impropriety, and failed to promote public confidence in the independence, integrity, and impartiality of the judiciary. Foster Parents contended that the unsolicited appeal from an acquaintance of thirty years ago had no bearing upon the court’s decision, and that no objective person understanding all of the circumstances would have a basis for doubting the judge’s impartiality. The Court noted Ind. Judicial Code Rule 2.9(B), which states that, “if a judge receives an unauthorized ex parte communication bearing upon the substance of a matter the judge shall make provision promptly to notify the parties of the substance of the communication and provide the parties with an opportunity to respond.” Id. at 623. The Court found that, in this case, the trial judge fully complied with this Rule in that after receiving the email, immediately upon reconvening, the judge noted the substance of the communication and provided the parties with an opportunity to respond. Id. The Court also found particularly relevant the judge’s statements that he did not know the fraternity brother any more, that anything the fraternity brother says had no meaning to the judge, and that the judge had no doubt that he could be fair. Id. The Court concluded that Relatives had not overcome the presumption that the trial court judge acted impartially. Id. The Court found that the judge’s decision recited in the order reflected a thorough, unbiased consideration of all the evidence before him. Id. at 625.

After reviewing the evidence, the Court could not conclude that the trial court’s order granting Foster Parents’ petition for adoption was clearly erroneous. Id. at 628. Relatives challenged a number of the trial court’s findings. The Court found in response to Relatives’ arguments, that the trial court had entered specific findings on all of the issues raised by Relatives. Id. at 625-626. Quoting In Re Adoption of T.L., 4 N.E. 3d 658, 662 (Ind. 2014), the Court observed that, “[w]hen reviewing the trial court’s ruling in an adoption proceeding, we will not disturb that ruling unless the evidence leads to but one conclusion and the trial court reached an opposite conclusion.” M.H. at 625. The Court said that Relatives had the burden of overcoming the presumption that the trial court’s decision was correct, citing In Re S.A., 918 N.E. 2d 736, 745 (Ind. Ct. App. 2009). M.H. at 627. The Court observed that the crux of Relatives’ argument was that they would provide a better home for the child, which essentially asked that the Court reweigh the evidence and find in their favor. Id. The Court said that it could not do this. Id. Quoting In Re Adoption of K.S., 980 N.E. 2d 385, 387 (Ind. Ct. App. 2012), the Court noted, “[w]e will not reweigh the evidence, but instead will examine the evidence most favorable to the trial court’s decision together with reasonable inferences drawn therefrom, to determine whether sufficient evidence exists to sustain the decision.” M.H. at 627. The Court acknowledge that it was beyond the scope of its authority to mandate visitation between Relatives and the child, but echoed the trial court’s words of encouragement that Foster Parents allow some degree of contact between them. Id. at 628.