

MEMORANDUM DECISION

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IN THE COURT OF APPEALS OF INDIANA

A.M.,
Appellant-Petitioner,

v.

S.R.,
Appellee-Respondent.

June 6, 2023

Court of Appeals Case No.
22A-AD-2254

Appeal from the Noble Circuit Court
The Honorable Michael J. Kramer,
Judge

Trial Court Cause No.
57C01-2202-AD-3

Memorandum Decision by Judge Tavitas
Judges Vaidik and Foley concur.

Tavitas, Judge.

Case Summary

- [1] A.M. (“Stepfather”) filed a petition to adopt his stepson, H.R., and argued that the consent of H.R.’s biological father, S.R. (“Father”), was not required. The trial court issued findings of fact and conclusions thereon and determined that S.R.’s consent to the adoption was required. Accordingly, the trial court denied the adoption petition.
- [2] Stepfather appeals and argues that the trial court’s determination that S.R.’s consent to the adoption was required was clearly erroneous. Stepfather also argues that the trial court erred by appointing pauper appellate counsel for Father and that we should, as a result, strike Father’s brief. We find that the trial court did not clearly err by determining that Father’s consent to the adoption was required and that Stepfather’s challenge to the trial court’s appointment of pauper counsel for Father is not a proper ground for relief. Accordingly, we affirm.

Issues

- [3] Stepfather raises two issues on appeal, which we restate as:
- I. Whether the trial court clearly erred by determining that Father’s consent to the adoption was required.
 - II. Whether the trial court erred by appointing pauper appellate counsel for Father.

Facts

- [4] H.R. was born in March 2017 to N.K.M. (“Mother”) and Father. Father, Mother, and H.R. lived together for the first few weeks after H.R. was born. When H.R. was

approximately nine-months old, Father was arrested on outstanding warrants, charged with several offenses, and taken to the Dekalb County Jail. Mother took H.R. with her to visit Father at the jail approximately five or six times. In June or July 2018, Mother stopped the visits after Father became hostile with Mother for beginning a relationship with Stepfather.¹

[5] In the fall of 2018, Father was transferred to the Indiana Department of Correction. Father called Mother and H.R. from prison and, at times, continued to harass Mother. In October 2019, Mother stopped answering Father's phone calls.

[6] Father subsequently filed a paternity action, and, on March 17, 2020, the trial court held a hearing on the petition. The trial court adjudicated Father's paternity of H.R. and held that Father could establish parenting time upon his release. In addition, the trial court stated in open court that Mother was not required to communicate with Father over the phone and that the parties would communicate via written correspondence.² For the remainder of 2020, Father, who was still in prison, wrote to H.R. "constantly" and sent Christmas gifts. Tr. Vol. II p. 22.

[7] In July 2021, Father sent one letter and three drawings to H.R. In September 2021, Father was placed on work release. Father attempted to contact Mother over text and Facebook; however, Mother blocked him. In December 2021, Father filed a petition to establish child support and parenting time. The trial court had not yet

¹ Mother then permitted Father's mother to bring H.R. on approximately three or four visits to Father in jail.

² The trial court's directive regarding Father's communication with Mother and H.R. was not incorporated into a written order.

held a hearing on Father’s request for parenting time at the time of the instant adoption hearing.

- [8] On January 24, 2022, Stepfather and Mother married, and on February 21, 2022, Stepfather petitioned to adopt H.R. Stepfather alleged that Father’s consent to the adoption was not required because:

[P]ursuant to Indiana Code Section 31-19-9-8[(a)](11) . . . [Father] . . . has not consistently, seen, supported, or communicated with [H.R.] for a three[-]year period prior to the date of the filing of this petition, [Father] is unfit, and the best interests of [H.R.] will be served.

Appellant’s App. Vol. II p. 15. Stepfather requested that the trial court issue findings of fact and conclusions thereon.

- [9] The trial court held a hearing on Stepfather’s adoption petition on June 9, 2022. Mother testified that Father wrote “constantly” to H.R. in 2022 and sent H.R. Christmas gifts that year, but that, in 2021, she received only the July 2021 letter and drawings from Father.³ Tr. Vol. II p. 22. Mother further testified that, under the trial court’s directive in the paternity adjudication, she believed that she was not required to have contact with Father over the phone but was only required to read Father’s letters to H.R.

- [10] Father testified and admitted that he had a history of addiction, criminal activity, and being absent from H.R.’s life; however, Father testified that he was “sick and

³ Mother and Father testified that the letter was sent in August, however, the letter is dated July 14, 2021.

tired of living the life that [he] lived” and “was ready to grow up and be a man” and “be a part of [H.R.’s] life” *Id.* at 127. Father further testified that he has maintained consistent employment since being placed on work release, he began paying child support once child support was established,⁴ and he had not committed any new criminal offenses since he was incarcerated.

[11] The Guardian ad Litem (“GAL”) recommended that the trial court not dispense with Father’s consent to the adoption. The GAL testified that Father completed and participated in several parenting and drug treatment programs while incarcerated and that Father could be “rehabilitated.” *Id.* at 156. The GAL further testified that it was in H.R.’s best interests to have a relationship with his biological father.

[12] On August 23, 2022, the trial court found the following:

FINDINGS OF FACT

* * * * *

2. When [H.R.] was born, [Mother] and [Father] cohabitated. . . .

* * * * *

6. [Father] telephoned [Mother] from the Department of Corrections [sic] until she blocked his calls and blocked him on

⁴ On April 14, 2022, the trial court ordered that Father pay child support in the amount of \$193 per week through an income withholding. Mother testified that Father’s child support payments have “been consistent since we went to court” Tr. Vol. II p. 47.

Facebook. [Mother] claimed that [Father] was verbally abusive to her in his calls.

7. [Father] filed a petition to establish paternity On March 17, 2020, the court entered an order establishing paternity. . . . The court did order that [Mother] provide periodic photographs and that she read [Father's] letters to [H.R.]. [Mother] testified that [Father] sent a lot of letters to [H.R.]

8. [Father] received federal COVID funds and used those funds to purchase Christmas presents for [H.R.]. . . .

9. On September 13, 2021, [Father] began serving his sentence on work release through community corrections. . . .

10. [Father] hired counsel to represent him. On December 1, 2021, [Father] filed a petition to establish child support and parenting time. . . .

* * * * *

12. [At a] hearing in the paternity case and the instant case, the court established child support but deferred establishing parenting time pending the outcome of the adoption.

13. [Father] has consistently paid child support since the court determined the amount of support to be paid.

* * * * *

15. [Father] testified that he has changed, is holding a job, and [is] obeying the rules of community corrections.

16. The guardian ad litem in this matter recommends that the adoption be denied.

CONCLUSIONS OF LAW

* * * * *

E. [Father] maintained contact with [H.R.] until [Mother] blocked contact. [Father] attempted to establish parenting time while he was incarcerated. [Stepfather] failed to prove any one-year period during which [Father] failed to maintain[] significant contact.

F. [Stepfather] failed to prove by clear and convincing evidence that [Father] is unfit to be a parent and it is in [H.R.'s] best interests to dispense with [Father's] consent.

Appellant's App. Vol. II pp. 9-11. The trial court determined that Father's consent to the adoption was required and, as a result, denied the adoption petition. Stepfather now appeals.

Discussion and Decision

I. Consent to the Adoption

[13] Stepfather argues that the trial court clearly erred by finding that Father's consent to the adoption was required. We disagree.

[14] "We generally show 'considerable deference' to the trial court's decision in family law matters 'because we recognize that the trial judge is in the best position to judge the facts, determine witness credibility, get a feel for the family dynamics, and get a sense of the parents and their relationship with their children.'" *In re Adoption of I.B.*,

163 N.E.3d 270, 274 (Ind. 2021) (quoting *E.B.F. v. D.F.*, 93 N.E.3d 759, 762 (Ind. 2018)). In addition, because Stepfather carried the burden of proof at the adoption hearing, he appeals from a negative judgment. See *In re Adoption of S.P.*, 172 N.E.3d 344, 351 (Ind. Ct. App. 2021). “We will reverse a negative judgment only if the decision of the trial court is contrary to law.” *Id.* Ordinarily, “[i]n determining whether a negative judgment is contrary to law, we neither reweigh evidence nor judge witness credibility” and “consider only the evidence most favorable to the prevailing party together with all reasonable inferences flowing therefrom.” *Id.*

[15] Turning to the case at bar, Stepfather challenges several of the trial court’s findings of fact and conclusions thereon. When a trial court enters findings of fact pursuant to Trial Rule 52(a), we employ a two-tiered standard of review. *M.G. v. S.K.*, 162 N.E.3d 544, 547 (Ind. Ct. App. 2020) (citing *In re Paternity of M.G.S.*, 756 N.E.2d 990, 996 (Ind. Ct. App. 2001), *trans. denied*). “First, we must determine whether the evidence supports the trial court’s findings of fact and second, we must determine whether those findings of fact support the trial court’s conclusions thereon.” *Id.* In evaluating whether the findings support the judgment, “we will reverse ‘only upon a showing of clear error—that which leaves us with a definite and firm conviction that a mistake has been made.’” *Masters v. Masters*, 43 N.E.3d 570, 575 (Ind. 2015) (quoting *Egley v. Blackford Cnty. Dep’t of Pub. Welfare*, 592 N.E.2d 1232, 1235 (Ind. 1992)) (internal quotation marks omitted).

[16] Regarding Stepfather’s contention that Father’s consent to the adoption should not be required, our Supreme Court has held that “[a] natural parent enjoys special protection in any adoption proceeding,” and we “strictly construe our adoption

statutes to preserve the fundamentally important parent-child relationship.” *I.B.*, 163 N.E.3d at 274. In general, “a petition to adopt a child who is less than eighteen (18) years of age may be granted only if written consent to adoption has been executed by . . . [t]he mother of a child born out of wedlock and the father of a child whose paternity has been established. . . .” Ind. Code § 31-19-9-1(a)(2). “[U]nder carefully enumerated circumstances,” however, the adoption statutes allow “the trial court to dispense with parental consent and allow adoption of the child.” *I.B.*, 163 N.E.3d at 274 (citing Ind. Code ch. 31-19-9).

[17] As relevant here, Indiana Code Section 31-19-9-8 provides:

(a) Consent to adoption, which may be required under section 1 of this chapter, is not required from any of the following:

(1) A parent or parents if the child is adjudged to have been abandoned or deserted for at least six (6) months immediately preceding the date of the filing of the petition for adoption.

(2) A parent of a child in the custody of another person 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 required by law or judicial decree.

* * * * *

(11) A parent if:

(A) a petitioner for adoption proves by clear and convincing evidence that the parent is unfit to be a parent; and

(B) the best interests of the child sought to be adopted would be served if the court dispensed with the parent's consent.^[5]

* * * * *

(b) If a parent has made only token efforts to support or to communicate with the child the court may declare the child abandoned by the parent.

[18] Stepfather argues that Father's consent to the adoption was not required because: (1) Father is unfit to be a parent and dispensing with Father's consent is in H.R.'s best interests; and (2) Father failed to communicate significantly with H.R. for a period of at least one year.⁶ With this background in mind, we turn to the parties' arguments.

⁵ "Indiana Code section 31-19-9-8(a) is written in the disjunctive, so each of the sub-sections provides an independent ground for dispensing with consent." *I.B.*, 163 N.E.3d at 275.

⁶ Stepfather also argues that Father's consent to the adoption was not required because, pursuant to Indiana Code Section 31-19-9-8(b), Father abandoned H.R. by making only "token efforts" to communicate with H.R. Father, meanwhile, argues that Stepfather's argument is waived because the adoption petition does not allege that Father abandoned H.R. Indeed, the petition neither mentions the words "abandon," "desert," nor "token" nor cites either of the statutory provisions governing abandonment. In fact, the only statutory provision it cites is Indiana Code Section 31-19-9-8(a)(11), which governs a different ground for dispensing with a biological parent's consent to the adoption than abandonment. Further, Stepfather does not cite to any portion of the record demonstrating that Stepfather presented his token efforts argument to the trial court. *See* Ind. App. R. 46(A)(8)(a) (requiring that arguments on appeal "be supported by citations to . . . the Appendix or parts of the Record on Appeal relied on"). Accordingly, we find Stepfather's argument waived. Waiver notwithstanding, in 2021, Father wrote to H.R. and filed to establish child support and parenting time. We are not persuaded that Father abandoned H.R.

A. Fitness and Best Interests

[19] Stepfather argues that Father’s consent to the adoption was not required because, pursuant to Indiana Code Section 31-39-9-8(a)(11), Father is unfit to be a parent and dispensing with Father’s consent is in H.R.’s best interests. The trial court concluded otherwise, and we find that the trial court did not clearly err.

[20] “While the term ‘unfit’ as used in Ind. Code § 31-19-9-8(a)(11) is not statutorily defined, this Court has defined ‘unfit’ as ‘[u]nsuitable; not adapted or qualified for a particular use or service’ or ‘[m]orally unqualified; incompetent.’” *K.H. v. M.M.*, 151 N.E.3d 1259, 1267 (Ind. Ct. App. 2020) (quoting *In re Adoption of M.L.*, 973 N.E.2d 1216, 1223 (Ind. Ct. App. 2012)), *trans. denied*. A panel of this Court has further observed that:

[S]tatutes concerning the termination of parental rights and adoption strike a similar balance between the parent’s rights and the child’s best interests and thus termination cases provide useful guidance in determining whether a parent is unfit. Termination cases have considered factors such as a parent’s substance abuse, mental health, willingness to follow recommended treatment, lack of insight, instability in housing and employment, and ability to care for a child’s special needs. Also, this Court has consistently held in the termination context that it need not wait until children are irreversibly harmed such that their physical, mental, and social development are permanently impaired before terminating the parent-child relationship. . . . A parent’s criminal history is relevant to whether the parent is unfit under Ind. Code § 31-19-9-8(a)(11).

Id. at 1267-68 (citations omitted).

[21] Stepfather argues that Father is unfit to be a parent because of Father's history of addiction, criminal activity, and being an absent parent, and due to Father's failure to provide support for H.R. before such support was ordered. Stepfather argues that dispensing with Father's consent to the adoption is in H.R.'s best interests for the same reasons that Father is unfit to be a parent and because H.R. does not respond well to change; H.R. has a close relationship with Stepfather and no relationship with Father; and Stepfather "is a wonderful father figure" Appellant's Br. p. 33.

[22] At trial, the GAL recognized that Father had "a significant history of drug activity and criminal activity"; however, the GAL testified that Father had completed and participated in several parenting and drug treatment programs while incarcerated and that Father could be "rehabilitated." Tr. Vol. II p. 156. The GAL further opined that it was in H.R.'s best interests to have a relationship with his biological father and that Father could be "gradually and therapeutically introduced into [H.R.'s] life and [H.R.] will have a bonus dad." *Id.* The GAL explained that, in arriving at his conclusions, he met with Father and with Mother and Stepfather, but did not meet with H.R.

[23] In finding that Stepfather failed to prove Father is unfit to be a parent and it is in H.R.'s best interests to dispense with Father's consent, the trial court relied on the GAL's testimony regarding Father's ability to rehabilitate himself. *Cf. J.H. v. S.S.*, 93 N.E.3d 1137, 1141 (Ind. Ct. App. 2018) (finding "no indication that [mother] intends to stop drinking or using drugs" and affirming trial court's conclusion that mother was unfit to be a parent and that her consent to the adoption was not required). The trial court also relied on Father's petition to establish child support and parenting

time, Father's consistent child support payments since those payments were ordered, and Father's testimony regarding his rehabilitation and interest in being a father to H.R.

[24] While much of the evidence was disputed, the trial court was in the best position to assess the witnesses' credibility and weigh the conflicting evidence, and we are not permitted to second-guess those determinations. Accordingly, we cannot say that the trial court clearly erred by finding that Stepfather failed to prove that, pursuant to Indiana Code Section 31-39-9-8(a)(11), Father was unfit to be a parent and that dispensing with Father's consent to the adoption was in H.R.'s best interests.

B. Communications

[25] Stepfather also argues that Father's consent to the adoption was not required because, pursuant to Indiana Code Section 31-39-9-8(a)(2)(A), Father failed to communicate significantly with H.R. for a period of at least one year.

[26] The Indiana Supreme Court has held:

A determination on the significance of the communication is not one that can be mathematically calculated to precision. Indeed, even multiple and relatively consistent contacts may not be found significant in context. On the other hand, a single significant communication within one year is sufficient to preserve a non-custodial parent's right to consent to the adoption.

I.B., 163 N.E.3d at 276 (citations omitted).

[27] Our analysis of whether a parent's contacts with their child are significant depends, in part, on whether that parent is incarcerated. *See, e.g., K.H. v. M.M.*, 151 N.E.3d

1259, 1267 (Ind. Ct. App. 2020). This Court has held that, while confinement alone does not “constitute justifiable reason for failing to maintain significant communication with one’s child,” “[i]ncarceration . . . unquestionably alters the means for significant communication.” *Id.* (citing *Lewis v. Roberts*, 495 N.E.2d 810, 813 (Ind. Ct. App. 1986)). “What constitutes insignificant communication with a free parent may be significant in relation to an incarcerated parent with limited access to his child.” *Id.* (citing *Lewis*, 495 N.E.2d at 813).

[28] Stepfather argues that Father failed to communicate significantly with H.R. “between March of 2017 and March of 2020, and January of 2021 until the date of trial.” Appellant’s Br. p. 21. The parties agree, however, that Father communicated with H.R. at least once each year during that time period. In 2017, H.R. was born, and Father, Mother, and H.R. lived together temporarily. In 2018, H.R. visited with Father in jail; and in 2019, Father communicated with H.R. and Mother over the phone. In 2020, Father wrote letters to H.R. and sent Christmas gifts; and in 2021, Father sent the July letter and drawings to H.R.

[29] The only question, then, is whether these communications were significant. Given the circumstances of Father’s incarceration and the restrictions on Father’s ability to communicate with H.R., we find that that determination is better left to the trial court. Here, the trial court found that Father’s communications were significant, and we cannot say that finding was clearly erroneous.

II. Appointment of Pauper Appellate Counsel

[30] Stepfather also argues that the trial court erred by appointing pauper appellate counsel for Father and that we should, as a result, strike Father's brief. Pursuant to Appellate Rule 66, "[n]o error or defect in any ruling or order or in anything done or omitted by the trial court or by any of the parties is ground for granting relief or reversal on appeal where its probable impact, in light of all the evidence in the case, is sufficiently minor so as not to affect the substantial rights of the parties." Stepfather fails to demonstrate how the trial court's appointment of pauper appellate counsel for Father affected Stepfather's substantial rights and, therefore, we do not address Stepfather's argument.

Conclusion

[31] The trial court did not clearly err by finding that Father's consent to the adoption was not required, and Stepfather's challenge to the trial court's appointment of pauper counsel for Father is not a proper ground for relief. Accordingly, we affirm.

[32] Affirmed.

Vaidik, J., and Foley, J., concur.