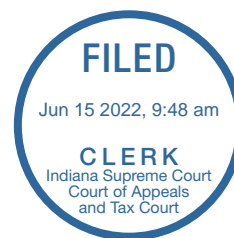


MEMORANDUM DECISION

Pursuant to Ind. Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



ATTORNEY FOR APPELLANT

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IN THE COURT OF APPEALS OF INDIANA

In re: the Adoption of K.R.

R.M. (Stepfather),
Appellant-Petitioner,

v.

T.R. (Father),
Appellee-Respondent.

June 15, 2022

Court of Appeals Case No.
21A-AD-2449

Appeal from the Hendricks
Superior Court

The Honorable Robert W. Freese,
Judge

Trial Court Cause No.
32D01-2007-AD-36

Altice, Judge.

Case Summary

- [1] R.M. (Stepfather) appeals the trial court's order determining that the consent of T.R. (Father) was required on Stepfather's petition for adoption of K.R. (Child).
- [2] We affirm.

Facts & Procedural History

- [3] Father and J.M. (Mother) are the biological parents of Child, born in February 2012. At the time of Child's birth, Father and Mother were in a relationship but not married. They lived together as a family for about one year, before separating in early 2013. Thereafter, in 2013 or 2014, Mother and Child relocated to New Palestine and began living with Stepfather. For a time, Mother and Father informally worked out custody and parenting time, with Mother having physical custody of Child, and Father exercising parenting time generally every other weekend or as they otherwise agreed.
- [4] As the months progressed, Father was not paying child support on a consistent basis, and Mother and Father's ability to coordinate parenting time deteriorated. In August 2013, Mother texted Father: "When I get [the support] money so she can get what she needs then we can talk about you getting her" for visitation. *Exhibits Vol.* at 69. Mother testified that she began to believe that Child was "unsafe" when Father exercised parenting time, so she required that Father's parenting time be exercised at her residence. *Transcript* at 16. Father

was unhappy that he had “to come to her house and sit in front of her family” to spend time with Child. *Id.* at 63.

- [5] On September 10, 2015, Father filed paternity proceedings in Boone County through the assistance of the Title IV-D office. Father later wrote a letter to the court requesting that in addition to child support, issues of custody and parenting time be addressed.
- [6] On December 8, 2015, the Boone County court issued an order awarding Mother sole legal and physical custody of Child, and Father was awarded reasonable parenting time in accordance with Indiana’s Parenting Time Guidelines. The court’s child support order, retroactive to September 2015, set Father’s weekly support obligation at \$52 (equating to \$2704 annually), plus an additional \$8 per week toward an existing arrearage. The court ordered the parties to alternate claiming the tax exemption starting in 2015, with Mother having the odd numbered years. As a condition to receiving the exemption, the court ordered that Father must have paid at least 95% of his annual child support obligation for the calendar year by January 31 of the following year, and if he had, Mother was to timely sign and forward the appropriate form to Father.
- [7] In March or April 2016, Father texted and requested to see Child to give her an Easter basket, and Mother advised that he could bring it to Child at Mother’s home, which he did. Mother informed Father that Child had an upcoming gymnastics event on April 10, 2016, which Father attended. Around that same

timeframe, Mother texted Father that she would no longer communicate with him through “other people’s phones[.]” *Exhibits Vol.* at 33. The April 16, 2016 gymnastics event was the last time Father saw Child. In December 2016, Child asked Mother to call Father. Mother did so, but the phone was disconnected.

[8] Although the court order required that Father begin making child support payments in December 2015, he did not begin doing so until February 2016, and his support payments were sporadic. In 2016, Father earned \$3291 and paid \$516.06 in child support. In 2017, he earned \$3550 and paid \$855.43 in child support. Father made no payments during the period of April 15, 2016, through May 19, 2017. In 2018, he earned \$25,354 and paid \$3856.22 in child support.

[9] Mother and Stepfather married in October 2018. In 2019, they relocated from New Palestine to Danville, Indiana. Mother did not file a notice of intent to relocate as required by Ind. Code § 31-17-2.2-1.

[10] On July 10, 2020, Stepfather filed a petition for adoption and accompanying notice to Father. Stepfather alleged that, pursuant to Ind. Code § 31-19-9-8, Father’s consent was unnecessary because he failed to provide for care and support of child, failed without justifiable cause to significantly communicate with Child when able to do so, and was unfit to parent Child, such that her best interests would be served if the court dispensed with Father’s consent. Mother consented to the adoption.

- [11] On August 26, 2020, Father timely filed a pro se motion to contest the adoption, and on September 24, 2020, the court granted Father's request for counsel and appointed an attorney to represent him. A contested hearing on the petition for adoption was held on August 11, 2021.
- [12] At the hearing, evidence was presented that, in 2019, Father earned \$33,119 and paid \$5665.29 in child support, which included payments from January to August 2019. He made no payments for about eight months, until March 2020 when he paid \$72. In May 2020, he paid \$257, as well as \$1463 which represented a portion of his tax refund check that was credited to his child support obligation. In the summer of 2021, he made two \$60 child support payments prior to the August 2021 hearing.
- [13] Mother testified that Father has not visited with Child since April 10, 2016, when he attended Child's gymnastics event and that, since that day, Father had not reached out to communicate with Mother or Child by mail, email, or text and had not mailed any cards or gifts to Child. Mother's testified that her cell phone number was unchanged since Father last communicated with her in April 2016 and that she could also be reached through Facebook.
- [14] On cross-examination, Mother agreed that because she never filed a notice of change of address when she moved from New Palestine to Danville, Father would not know where to send correspondence. Mother acknowledged that she claimed the tax exemption in 2018, although Father's payments made in 2018 exceeded the 95% threshold that the Boone County order required for Father to

receive the exemption for the calendar year. With regard to Mother telling Father that she would no longer communicate with him via someone else's phone, Mother explained that "[i]t was never a consistent phone, it was always changing or multiple phone numbers or someone else's phone." *Transcript* at 29. She had no dispute that it was Father who was texting her and acknowledged that Father told her that he was sharing a phone with his long-time girlfriend to save on household expenses. Mother agreed that she could have but did not provide Father with information about what elementary school Child was attending.

[15] Father testified that he initiated the 2015 paternity action because he "wasn't getting anywhere" with scheduling parenting time. *Id.* at 38. He described that his attempts to contact Mother to coordinate parenting time "came to a screeching halt" when she told him that she "was no longer going to communicate with [him] through somebody else's phone," although he stated that they had been using that phone to communicate for two years. *Id.* at 39. He testified, "[S]he started like putting up a major wall" and "eventually she pretty much just stopped communicating with me[.]" *Id.* at 42. Father stated that he missed several of Child's birthdays "because of vindictiveness" and that Mother "played hard ball" when he would try to see Child over holidays. *Id.* at 54, 55. Father testified that he was unaware that Mother and Child had moved to Danville until he read that information in Stepfather's petition to adopt Child.

[16] When asked whether he had attempted to reach Mother in the last year, Father replied, "I have not, my family has, but I have not." *Id.* at 44. He explained that

he “was armed with basically inexperience with all this,” so he followed the suggestion of the “head of [] child support division” who had confidentially told him on multiple occasions, “just let us handle it” because “it can get nasty[.]” *Id.* at 44, 74; *see also id.* at 67 (describing being told “you should let us handle this because this is what we do”). Father disputed any suggestion that neither he nor his family had tried to contact Mother, stating that he knew “she ain’t gonna talk to me,” so he told family members, “you give it a try . . . maybe she’ll talk to you.” *Id.* at 87. Father testified that it was “absolutely not” his intention to abandon Child, “[n]ever in a million years.” *Id.* at 45. He noted that he had paid much of his child support obligation “in this time frame I haven’t seen my daughter,” which he urged did not evidence abandonment and, rather, showed “a plan to maintain some sort of [] contact while the courts do what I thought the courts were supposed to do for me and uphold [sic] her to parenting time and uphold [sic] me for [my] child support obligation.” *Id.* at 59.

[17] In January 2022, the trial court issued amended findings of fact and conclusions of law, concluding that Father’s consent was required.¹ In the order, the trial court initially determined that Father’s lack of significant communication with Child was due to justifiable cause. In support, the Court found the following:

a. Even prior to the commencement of the paternity matter by Father, Mother used parenting time with Child as a sword to attempt to extract financial consideration from Father.

¹ The trial court’s original findings of fact and conclusions of law were issued in September 2021.

Regardless of Father's financial status, Child's best interests would have been served by permitting parenting time.

b. Upon the filing of the paternity matter by Father, Mother suddenly insisted that Father's parenting time be supervised in nature. This maneuver by Mother was a punitive act toward Father for his pursuit of legal recourse.

* * *

d. Mother admitted that she did not make any efforts to assist Child in reaching Father in December of 2016 once it was discovered that the telephone number had been disconnected.

e. These acts demonstrate to the Court that Mother consistently placed her own interests ahead of the best interests of Child.

f. More recently, Mother has failed to keep Father apprised of Child's residence. Specifically, Mother moved to Danville two (2) to three (3) years ago from New Palestine. When Mother relocated to Danville, she did not comply with the clear language of Indiana Code, Section 31-17-2.2-1.

g. Due to Mother's violation of Indiana law, Father did not know that Child had relocated until the filing of this matter.

* * *

[i.] By purposefully failing to adhere to the law, Mother thwarted Father's ability to have significant written communication with Child. . . .

[j.] The combination of Mother’s history of undermining Father’s parenting time with Child and Mother’s complete failure to adhere to the law regarding notice of relocation amount to justifiable cause in explaining Father’s lack of significant communication with Child.

Appellant’s Appendix at 113-15 (cleaned up).

[18] The court next determined that, although Father did not pay child support consistently, he “has provided for the care and support of [Child] when able to do so as required by the [child support order] for a period of one year” prior to the filing of the petition to adopt. *Id.* at 115. More specifically, the court found that from 2018 through March 2020, he paid child support for Child on “a semi-regular basis” and that Father suffered the hand injury in March 2020 that prevented him from working for a period of at least one year, but “this inability to provide financial support for [Child] was not intentional by Father.” *Id.* at 115, 116.

[19] The court summarized,

The Court concludes that Father made more than “token” efforts to support or to communicate with Child sufficient to declare Child not abandoned by Father.

a. Father has demonstrated that he has never intended to abandon Child.

b. Even though Father’s communication and parenting time with Child was thwarted by Mother, Father continued to provide financial support for Child.

Id. (cleaned up). Stepfather now appeals.

Discussion & Decision

- [20] Stepfather argues that the trial court's order finding that Father's consent was necessary was clearly erroneous. When 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 judge reached an opposite conclusion. *In re Adoption of T.L.*, 4 N.E.3d 658, 662 (Ind. 2014) (quotation omitted). We presume the trial court's decision is correct, and we consider the evidence in the light most favorable to the decision. *Id.*
- [21] When the trial court has made findings of fact and conclusions of law, this Court will apply a two-tiered standard of review: first determine whether the evidence supports the findings and second, determine whether the findings support the judgment. *Id.*; *see also* Ind. Trial Rule 52(A). Factual findings are clearly erroneous if the record lacks any evidence or reasonable inferences to support them, and a judgment is clearly erroneous when it is unsupported by the findings of fact and the conclusions relying on those findings. *Id.*
- [22] Where, as here, an appellee fails to submit a brief, our standard of review is relaxed because we will not assume the responsibility of developing arguments for the appellee. *McElvain v. Hite*, 800 N.E.2d 947, 949 (Ind. Ct. App. 2003). We review the trial court's decision for "prima facie error." *Id.* Prima facie, in this context, means at first glance or on the face of it. *Id.* Consequently, we review

for prima facie error the trial court's determination that Father's consent was required.

[23] Parental consent is generally required to adopt a child in Indiana. *In re Adoption of S.W.*, 979 N.E.2d 633, 639 (Ind. Ct. App. 2012). However, under I.C. § 31-19-9-8(a)(2), consent to adoption is not required from a parent of a child in the custody of another person if for a period of at least one 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.

Further, consent to adopt is not required from “a parent or parents if that child is adjudged to have been abandoned or deserted for at least six months immediately preceding the date of the filing of the petition for adoption[,]” and “[i]f 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.” I.C. §§ 31-19-9-8(a)(1), (b). The burden to prove this statutory criterion is satisfied by clear and convincing evidence rests squarely upon the petitioner seeking to adopt. *In re T.L.*, 4 N.E.3d at 662. The provisions of this section are disjunctive, and any one provides independent grounds for dispensing with parental consent. *In re S.W.*, 979 N.E.2d at 640.

Communication

- [24] Stepfather emphasizes that since April 10, 2016, Father “has not called, has not visited, has not emailed, has not mailed letters, has not contacted [Child]’s school, has not sought Mother out on social media, and has failed to file any motions in the paternity court to enforce parenting time.” *Appellant’s Brief* at 13. Stepfather argues that the trial court erred when it determined that Mother’s behavior thwarted Father’s involvement with Child such that his lack of communication was justifiable. Stepfather’s argument is essentially a request to reweigh the evidence and judge witness credibility, which we cannot do. *In re S. W.*, 979 N.E.2d at 639 (“We will neither reweigh the evidence or judge the credibility of witnesses; instead, we will consider the evidence most favorable to the trial court’s decision, and the reasonable inferences to be drawn therefrom, to determine whether sufficient evidence exists to sustain the decision.”).
- [25] The court heard testimony that, beginning before Father filed his petition to establish paternity in 2015, Mother began making it difficult for Father to exercise parenting time, and eventually she unilaterally required that it occur at her residence, supervised by her or her family. Then a few months after Father filed to establish paternity, Mother told him she would no longer be willing to communicate with him on a shared phone, despite knowing that it was, in fact, Father that she was communicating with. Father testified that, because Mother would not talk to him, his family members reached out to her to try to assist

Father with scheduling parenting time.² Father testified, and the court was entitled to believe, that Father was unaware Mother and Child were living in Danville until he read Stepfather's petition. Mother acknowledged that Father would not have known the correct address to mail any cards or gifts, nor would he have known Child was attending school there.

[26] Stepfather highlights that there “was no evidence that Mother [] attempted to thwart communication since April 10, 2016.” *Appellant's Brief* at 13. Stepfather is not incorrect in that regard. However, that Mother's actions occurred *prior to* April 2016 does not require a finding that Father's actions after that date were not justifiable. The court concluded that it was Mother's conduct prior to April 2016 that justified Father's failure to communicate after that date.

[27] Stepfather argues that Father's claim of inexperience with the legal system and reliance upon informal advice from the child support division should not be believed because Father filed a paternity action, a guardianship action, an opposition to Stepfather's petition for adoption, and sought pauper counsel. Again, Stepfather's argument is a request to reweigh evidence and assess witness credibility, which we cannot do. *In re S.W.*, 979 N.E.2d at 639. The trial court was persuaded by Father's claim that, rather than continuing to try to coordinate directly with Mother, he was following guidance from the child

² “It has been held that visitation by paternal family members may constitute indirect communications with a non-custodial father[.]” *In re S.W.*, 979 N.E.2d at 641, although the record before us does not reflect whether family members successfully reached Mother or met with Child.

support division and relying on the courts to address and enforce parenting time and support issues. We cannot say that the trial court clearly erred in finding that Stepfather did not prove that Father failed to communicate significantly with Child for over a period of one year when able to do so.

Support

[28] I.C. § 31-19-9-8(a)(2)(B) requires that to dispense with a parent’s consent, a petitioner must prove that, for a period of at least one year, the parent knowingly failed to provide for the care and support of a child when able to do so as required by law or judicial decree. The petitioner for adoption must show that the noncustodial parent had the ability to make the payments he or she failed to make. *In re I.B.*, 163 N.E.3d 270, 277 (Ind. 2021). A court must look at the totality of the circumstances to determine the parent’s ability to pay, not just his or her income (or lack of income). *Id.*

[29] Stepfather points out that Father paid no support from August 27, 2019 through March 25, 2020 – which was prior to the hand injury that the court found rendered Father unable to work for a period of time. Stepfather further observes that from March 2020 through May 2020, Father voluntarily³ paid only \$329, or a “mere token of support.” *Appellant Brief* at 15. Stepfather urges that on this

³ Stepfather characterizes the \$1463 payment on May 16, 2020 as being “involuntary” as it was a seized tax refund check. *Appellant’s Brief* at 15.

record the trial court erred in finding that Father's consent was needed. We disagree.

[30] It is undisputed that Father did not pay support as ordered and that he paid more in some years than in others. Indeed, Father testified to being "ashamed" that there were times when he did not pay child support because he was angry about the lack of parenting time. *Transcript* at 71. However, the record reflects that Father paid some amount in child support during every calendar year from 2016 to 2021. And the court determined that Father's March 2020 hand injury prevented him from working and contributed to his failure to pay support for a period of time. Given the totality of the evidence, we cannot say that the trial court clearly erred in finding that Father did not, for a period of one year, knowingly fail to provide for the care and support of Child when able to do so.

Abandonment

[31] A parent's consent to adopt is not required if the court finds that the parent abandoned the child for at least six months immediately preceding the date of the filing of the petition for adoption. I.C. § 31-39-9-8(a)(1). Abandonment is defined as "any conduct by the parent which evinces an intent or settled purpose to forgo all parental duties and to relinquish all parental claims to the child." *In re Adoption of J.T.A.*, 988 N.E.2d 1250, 1254 (Ind. Ct. App. 2013) (quoting *In re Adoption of Childers*, 441 N.E.2d 976, 979 (Ind. Ct. App. 1982), *trans. denied*). A court may declare a child abandoned "[i]f a parent has made only token efforts to support or to communicate with the child[.]" I.C. § 31-19-9-8(b).

[32] Stepfather challenges the trial court's determination that Father made more than "token" efforts to support and communicate with Child in the six months prior to the filing of the July 2020 petition to adopt Child. He argues that, during this six-month time period, Father "made absolutely no attempt at communication" and voluntarily made only two child support payments totaling \$329, with the \$1463 payment representing a portion of his tax refund that was involuntarily withheld and applied toward past due support. This, Stepfather maintains, "show[s] 'token' efforts at best[.]" and, thus, the trial court erred in concluding that Father did not abandon Child. *Appellant's Brief* at 17.

[33] Stepfather's contentions amount to a request to reweigh evidence, which we cannot do. Father testified that he absolutely did not intend to abandon Child. In declining to find that Child was abandoned by Father, the court observed that Father continued to pay child support "on a semi-regular basis" for a period of years "[e]ven though Father's communication and parenting time with [Child] was thwarted by Mother[.]" *Appellant's Appendix* at 115, 116. Considering the evidence most favorable to the judgment, the trial court did not clearly err in finding that Child was not abandoned by Father for six months prior to the filing of Stepfather's petition to adopt Child.

[34] For all the reasons discussed, Stepfather has not established that the trial court's order requiring Father's consent to Child's adoption was clearly erroneous.

[35] Judgment affirmed.

Vaidik, J. and Crone, J., concur.