## MEMORANDUM DECISION




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# IN THE COURT OF APPEALS OF INDIANA

In re the Adoption of M.M.E.

W.T. (Mother),

*Appellant/Respondent,*

v.

L.N. and R.N.,

*Appellees/Petitioners.*

March 10, 2021

Court of Appeals Case No. 20A-AD-1859

Appeal from the Jackson Superior Court

The Hon. Bruce A. MacTavish, Judge

Trial Court Cause No. 36D02-2007-AD-23

**Bradford, Chief Judge.**

# Case Summary

[1] M.M.E. ("Child") was born in November of 2018 to W.T. ("Mother") and D.E. ("Father"). In January of 2019, Child was placed in the care of maternal grandmother L.N. ("Grandmother") and her husband R.N. (collectively, "Grandparents"). In July of 2018, Mother had one visit with Child before Grandparents were made her permanent guardians, and Mother was incarcerated beginning the next month for a total of nine months. While in prison, Mother sent no letters or packages to Child, and, while she did speak with Grandmother several times, never discussed Child until Grandmother broached the subject. Upon Mother's release from prison, she requested visitation with Child on more than a few occasions but was refused. In July of 2020, Grandparents petitioned to adopt Child. After a hearing, the trial court granted Grandparents' petition. Mother contends that the trial court's adoption order is not supported by sufficient evidence. Because we disagree, we affirm.

# Facts and Procedural History

[2] On November 19, 2018, Child, with a birth weight of four pounds and eleven ounces, was born to Mother and Father. On January 25, 2019, Child's care was assumed by Grandparents. On April 18, 2019, an order granting temporary guardianship of Child to Grandparents was issued. Since Grandparents assumed guardianship of Child, Mother has had one half-hour visit with her, which occurred on July 12, 2019. On July 28, 2019, a final order granting permanent guardianship of Child to Grandparents was issued,

pursuant to which Grandparents were under no obligation to allow Mother visitation with Child.

[3] Mother was incarcerated from August 1, 2019, to April 30, 2020, following the revocation of probation imposed after a burglary conviction. On July 6, 2020, Grandparents petitioned to adopt Child, alleging, *inter alia*, that Mother and Father had failed without justifiable cause to communicate significantly with Child and had knowingly failed to provided support despite being able to do so. On July 17, 2020, Mother contested the adoption.[1]

[4] An evidentiary hearing was held on August 25, 2020. Grandmother testified that Mother had begun using illegal drugs when she was eighteen years old, Child did not know Mother as her mother, and Mother had been living with Father after her release from prison, a situation about which she had lied to Grandmother. At the time of the hearing, Father was facing charges for Level 1 felony child molesting and four Level 4 felony charges. Grandmother indicated that Mother and Father had used drugs together, Mother had not had any significant contact with Child since July of 2019, neither Mother nor Father had provided Child with any support, and Mother had never sent any letters or packages to Child while incarcerated.

[5] Grandmother testified that she had had several telephone conversations with Mother when Mother was incarcerated, but indicated that Mother had only

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[1] There is no indication that Father contested Grandparents' adoption petition.

talked about "[w]hat was going on with her" while Grandmother would be the one talking about Child. Tr. Vol. II p. 21. Grandmother did acknowledge that she had refused "more than a few" requests Mother made to see Child after she was released from prison but had refused visitation because of Mother's lifestyle and her decision to live with Father upon her release from prison. Tr. Vol. II p. 25. On September 8, 2020, the trial court issued a decree of adoption in which it found the allegation in Grandparents' petition to be true, that adoption was in Child's best interests, and that Grandparents were able to provide Child with suitable support.

# Discussion and Decision

[6] We note that Grandparents have not filed an appellees' brief in this matter, and when the appellees do not file a brief, we need not undertake the burden of developing an argument for them. *Trinity Homes, LLC v. Fang*, 848 N.E.2d 1065, 1068 (Ind. 2006). Rather, we will reverse the trial court's judgment if the appellant presents a case of *prima facie* error. *Id.* "Prima facie error in this context is defined as, at first sight, on first appearance, or on the face of it." *Id.* (quotation omitted). Where an appellant does not meet this burden, we will affirm. *Id.*

[7] That said, Mother contends that the trial court's adoption decree is not supported by sufficient evidence.

> "When reviewing adoption proceedings, we presume that the trial court's decision is correct, and the appellant bears the burden of rebutting this presumption." *In re Adoption of J.L.J. and*

> *J.D.J.*, 4 N.E.3d 1189, 1194 (Ind. Ct. App. 2014) (citation omitted), *trans. denied*. We generally give 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." *MacLafferty v. MacLafferty*, 829 N.E.2d 938, 940 (Ind. 2005). We will not disturb the trial court's ruling "unless the evidence leads to but one conclusion and the trial judge reached an opposite conclusion." *Rust v. Lawson*, 714 N.E.2d 769, 771 (Ind. Ct. App. 1999) (citation omitted), *trans. denied*. The trial court's findings and judgment will be set aside only if they are clearly erroneous. *In re Paternity of K.I.*, 903 N.E.2d 453, 457 (Ind. 2009). "A judgment is clearly erroneous when there is no evidence supporting the findings or the findings fail to support the judgment." *Id.* "We will neither reweigh the evidence nor assess the credibility of witnesses, and we will examine only the evidence most favorable to the trial court's decision." *In re Adoption of A.M.*, 930 N.E.2d 613, 616 (Ind. Ct. App. 2010).

*In re Adoption of O.R.*, 16 N.E.3d 965, 972–73 (Ind. 2014).

[8] "Generally, a trial court may only grant a petition to adopt a child born out of wedlock who is less than eighteen years of age if both '[t]he mother of [the] child' and 'the father of [the] child whose paternity has been established' consent to the adoption." *Id.* at 973 (quoting Ind. Code § 31-19-9-1(a)(2)) (brackets in original). However, Indiana Code section 31-19-9-8(a)(2) provides that consent to an adoption is not required from

> (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.

The trial court found that each of these provisions applied to Mother, and although she challenges the trial court's findings with respect to each of them, "the statute is written in the disjunctive such that the existence of any one of the circumstances provides sufficient ground to dispense with consent." *In re O.R.*, 16 N.E.3d at 973 (citing *In re Adoption of D.C.*, 928 N.E.2d 602, 606 (Ind. Ct. App. 2010), *trans. denied*).

[9] We conclude, at the very least, that the evidence supports the trial court's determination that Mother, knowing that Child was in the custody of Grandparents for a period of at least one year, failed, without justifiable cause, to communicate significantly with her despite having the ability to do so. *See* Ind. Code § 31-19-9-8(a)(2)(A).

> A determination on the significance of the communication is not one that can be mathematically calculated to precision. [S]ignificance of the communication cannot be measured in terms of units per visit. *In re Adoption of J.P.*, 713 N.E.2d 873, 876 (Ind. Ct. App. 1999). Even multiple and relatively consistent contacts may not be found significant in context. *Id*. But a single significant communication within one year is sufficient to preserve a non-custodial parent's right to consent to the adoption. *In re Adoption of Subzda*, 562 N.E.2d 745, 749 (Ind. Ct. App. 1990).

*E.B.F. v. D.F.*, 93 N.E.3d 759, 763 (Ind. 2018).

[10] Even when Mother had visitation rights after Child's removal from her care in January of 2019 until late July of 2019, her exercise of those rights consisted of one half-hour visit in early July. After that one visit, Mother did telephone

Grandmother several times while incarcerated over the course of nine months, but mostly spoke of herself, only speaking of Child when Grandmother broached the subject. After Mother's release from prison, she did make some requests to visit with Child, but Grandmother refused to allow visitation because of Mother's continued association with persons who were negative influences, including Father, with whom Mother lived upon her release. The record also indicates that Mother never sent Child any letters or packages to Child while incarcerated.

[11] It is true that Mother's attempts to visit Child were admittedly rebuffed by Grandmother, and the Indiana Supreme Court has stated that "[a] custodial [grand]parent's efforts to thwart communication between the non-custodial parent and her child are relevant to determining the non-custodial parent's ability to communicate and should be weighted in the non-custodial parent's favor." *E.B.F*, 93 N.E.3d at 766. That said, we think it significant that Mother had no legal right to visitation after her release from prison yet never made a single attempt to petition the trial court for restoration of that right, which, as mentioned, had been suspended just prior to her incarceration. Under the circumstances, especially Mother's failure to send a letter or package to Child or even attempt to secure the right to visit Child when visitation was refused by Grandmother, we conclude that Mother has failed to establish that the trial court abused its discretion in this regard. Mother points to her testimony that she had, in fact, sent letters and packages to Child while incarcerated and did not live with Father upon her release, but this is nothing more than a request for

us to reweigh the evidence, which we will not do. *See, e.g.*, *In re Adoption of A.M.*, 930 N.E.2d at 616.

[12] We affirm the judgment of the trial court.

Kirsch, J., and May, J., concur.