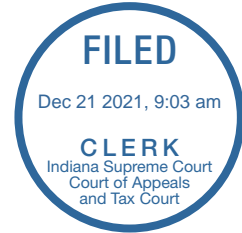


MEMORANDUM DECISION

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.



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IN THE COURT OF APPEALS OF INDIANA

In the Matter of the Adoption of
B.J.D.L.;

T.L.,
Appellant-Petitioner,

v.

C.W.,
Appellee-Respondent.

December 21, 2021

Court of Appeals Case No.
20A-AD-2086

Appeal from the Elkhart Superior
Court

The Honorable Stephen R.
Bowers, Judge

Trial Court Cause No.
20D02-1901-AD-2

Najam, Judge.

Statement of the Case

- [1] T.L. (“Father”) appeals the trial court’s order finding that his consent to C.W.’s (“Stepfather’s”) adoption of Father’s minor child B.J.D.L. (“Child”) was not required.
- [2] We affirm.

Facts and Procedural History

- [3] Father and I.V. (“Mother”) were married in December 2013, but Mother filed a petition for dissolution of the marriage in October 2014. Mother gave birth to Child on May 8, 2015. The dissolution court awarded Mother full custody of Child, and the court ordered supervised parenting time for Father. The court also ordered Father to pay child support.
- [4] Father regularly exercised parenting time with Child and paid child support until Father was arrested on February 21, 2018. Father was convicted for “unlawful drive-away automobile” and sentenced to twenty-three months in the Michigan Department of Corrections. Tr. at 95. Father did not visit with or directly contact Child during his incarceration.
- [5] Mother married Stepfather in July 2018. And on January 8, 2019, Stepfather filed his verified petition for adoption of Child. On January 17, Father filed a motion to contest the adoption. Following a hearing on the issue of whether Father’s consent to the adoption was required, the court issued findings and conclusions in part as follows:

5. The decree of dissolution awarded sole legal and primary physical custody of [Child] to [Mother], and she has maintained custody since that time. The same order established a parenting time schedule for Father that was greater than he had enjoyed during the pendency of the dissolution action. . . .

6. There has been extensive post-decree litigation regarding parenting time, child support, and related matters. The relationship between the former couple has been fractious.

7. [Stepfather and Mother] were married on July 1, 2018. . . .

8. Father's exercise of parenting time was fraught with conflict with Mother. Father attributes the difficulties to Mother's desire to control him and her attempts to prevent him from being involved in the child's life. Mother attributes the difficulties to Father's self-centered and unreasonable behavior, including his refusal to act in the best interests of the child. It is not necessary for the Court to resolve that dispute in order to decide the issues related to consent.

9. It is important to note that Father filed Rule to Show Cause pleadings on multiple occasions over the course of the action for dissolution of marriage and before the petition to adopt was filed.

10. The dissolution court found Mother to be in contempt of the Court's parenting time order, although the Court acknowledged Mother's frustration with Father's poor communication. The Court found that there was no evidence that Father would harm the child or allow others to do so. . . .

11. [Father] made considerable efforts to be regularly involved in [Child's] life until about February 21, 2018, although he missed some opportunities to have parenting time with his son or was late for exercise of his parenting time. These problems increased toward the end of 2017.

12. During the last month or so before February 21, 2018, Father's communication was limited due to missed parenting time. There is some conflict in the testimony as to when Father's last face-to-face contact with [Child] occurred. The Court finds Father's testimony persuasive that the last contact with [Child] occurred February 18, 2018, given that Father states that he was arrested on February 21, 2018.

13. Father sent text messages to Mother on February 23 and 28[, 2018,] that he needed to cancel parenting time because he had the flu. On March 7, 2018, he canceled parenting time because of the weather.

14. On March 10, 2018, Father texted Mother, "Until you hear from me, I need to just discontinue my parenting time with [Child]." No explanation was offered by Father or requested by Mother.

15. Father was incarcerated in Berrien County, Michigan, from February 21, 2018, through his sentencing date on June 11, 2018. Father was sentenced to 23 months in the Michigan Department of Correction (MDOC). His prison sentence was served in Jackson, Michigan.

16. On June 18, 2018, an order was entered in the dissolution of marriage action suspending Father's support obligation effective July 9, 2018. The Court also granted Mother's motion to suspend Father's parenting time. *The order did not prohibit communication with the child.* The Court notes that the order came after the dissolution court had received psychological evaluations of Mother and Father on April 11, 2018.

17. From February 21 through the date he was sentenced to prison in Michigan, Father made no attempt to contact or communicate with the child. This time period encompassed the child's third birthday on May 8, 2018, which passed without a call or a card from Father.

18. *Father did not have any direct contact or communication with [Child] during his incarceration in the Berrien County (Michigan) jail or his term of imprisonment in Michigan, although he claims he made efforts to do so.*

19. Father testified that he called Mother's telephone number from jail, but she would not "pick up" or answer the call. There is no evidence that Mother knew that the calls were from Father. Mother testified that she learned after the filing of the petition for adoption that unknown calls from Carleton, Texas, were actually from the MDOC. She testified that her telephone records are inconsistent with Father's testimony as to his calls from MDOC. The Court finds Mother's testimony more credible in this instance.

20. Father has presented no evidence other than his own testimony to document his claim that he attempted to call his son every week during his incarceration.

21. *Father did not seek the assistance of the dissolution court to facilitate or order contact with the child during his incarceration.*

22. The Court finds that Father knew how to contact Mother through her e-mail, which had not changed, or through her parents, whose contact information was known to him. Mother's belated filing of a notice to relocate does not appear to the Court to have had any bearing on Father's ability to communicate with her or the parties' child.

23. Father did attempt to contact the child after this petition for adoption was filed. He also sent a box of gifts, which was received by Mother in May 2019, well after the filing of this petition for adoption.

* * *

25. Father claimed that he wrote to his son every day while in prison. He has presented no evidence in support of his testimony. Correspondence in 2019, after the filing of the adoption petition, was less frequent than Father claims, and the content was not always appropriate for the child. As such, the Court finds that the Petitioner has not proved by clear and convincing evidence that Father intended to abandon the child, although the level of Father's commitment to the child is far from certain.

26. The paternal grandmother testified that she wrote letters to [Child] on her son's behalf. Paternal grandmother filed a Petition for Grandparent Visitation on January 19, 2020. That petition was denied as not being in the best interests of the child.

27. Father has repeatedly expressed his desire to maintain a relationship with this child, including seeking primary custody of the child, and he has paid child support when able to do so. But Father's actions have been inconsistent with his expressed intent: he allowed more than eight months to pass without communication with the child.

* * *

ABANDONMENT

* * *

It is clear and undisputed that Father had no contact with the child for a period of more than six months before the petition to adopt in this case was filed. When the evidence before the Court is considered in light of the necessity of intentional or purposeful conduct by Father, the Court concludes that Father did not abandon [Child]. If the Court were to apply the definition of the lesser burden of "knowingly" from the Criminal Code, the Court still could not fairly conclude that Father sought to abandon his child. In fact, the weight of the evidence is to the contrary. Father has

repeatedly expressed his desire to maintain a relationship with this child, including seeking primary custody of the child, and he has paid child support when able to do so. *But Father's actions have been inconsistent with his expressed intent: he allowed more than eight months to pass without communication with the child.*

The statute requires the court to look at the six months immediately prior to the filing of the petition to determine whether the child was abandoned. This case is factually similar to *K.S. v. D.S.*, in which the parent was found to have abandoned the child in the six months immediately prior to the filing of the petition. 64 N.E.3d 1209, 1211 (Ind. Ct. App. 2016). In *K.S. v. D.S.*, the parent ceased all visitations and communication with the child eight months prior to the filing of the petition. *Id.* at 1214. Her only attempt at contact during that period was a single phone call to the other parent, and her meager attempts to contact the child after the petition was filed were merely token efforts. *Id.* at 1215. In a case involving a similar period of time with no contact,¹ *Williams v. Townsend* held that an incarcerated parent who failed to engage in anything beyond token communication with the child while he was incarcerated had abandoned the child for purposes of adoption. 629 N.E.2d 252, 254 (Ind. Ct. App. 1994). While incarceration alone is not reason to indicate abandonment, the lack of substantial communication and failure to take legal action to enable visitation or communication both showed that the parent abandoned the child. *Id.* More generally, the Indiana Court of Appeals has found that statements of intent occurring prior to the six-month period before the filing of a petition are not relevant to the issue of abandonment. *In re Adoption of Subzda*, 562 N.E.2d 745, 748-49 (Ind. Ct. App. 1990).

Father exercised parenting time in earlier parts of the child's life, even when the time spent with the child had to be supervised. He has expressed desire to have contact with the child during his incarceration. But this Court is not required to accept Father's self-serving expression of his intent to maintain a relationship

with the child. Even if the Court were to accept Father's assertion at face value, having an interest in maintaining his relationship with the child says little or nothing about whether he is a good father or whether an ongoing relationship is in the best interests of the child. But that is not the issue the Court must decide.

Father's complete failure to have contact with the child in the six months before the filing of the petition on January 8, 2019, clearly demonstrates that Father abandoned the child. In fact, he had no contact for approximately a fourth of the life of this very young child immediately before the petition was filed. Although the aggravating factors from *Williams* are not present here, *K.S.*, 64 N.E.3d 1209, and *Williams*, 629 N.E.2d 252, both indicate that a lack of effort to communicate with the Child or petition the court to communicate with the child show an intention to abandon the child.

Appellant's App. Vol. 2 at 84-91 (emphases added). The court also found that Father had failed without cause to significantly communicate with Child for a period of one year. Thus, the court concluded that Father's consent was not required for the adoption. Following a hearing on Stepfather's adoption petition, the court granted the adoption. This appeal ensued.

Discussion and Decision

[6] Father contends that the trial court erred when it concluded that his consent to the adoption was not required. As our Supreme Court recently stated:

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.” *E.B.F. v. D.F.*, 93 N.E.3d 759, 762 (Ind. 2018) (cleaned up). So, “when reviewing an adoption case, we presume that the trial court’s decision is correct, and the appellant bears the burden of rebutting this presumption.” *Id.* And we will not disturb that decision “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). “We will not reweigh evidence or assess the credibility of witnesses.” *E.B.F.*, 93 N.E.3d at 762 (citation omitted). “Rather, we examine the evidence in the light most favorable to the trial court’s decision.” *Id.* (citation omitted).

J.P. v. V.B. (In re Adoption of I.B.), 163 N.E.3d 270, 274 (Ind. 2021).

- [7] Indiana law generally requires natural parents to consent to adoptions. Ind. Code § 31-19-9-1 (2021). However, as relevant here, a natural parent’s consent to an adoption is not required if the trial court finds by clear and convincing evidence either that (1) the child has been abandoned by his parent for at least six months immediately preceding the date of the filing of the petition for adoption or (2) for a period of at least one year, the parent fails without justifiable cause to communicate significantly with the child when able to do so. I.C. § 31-19-9-8(a). And Indiana Code Section 31-19-9-8(b) states in relevant part that if a parent has made only token efforts to communicate with the child the court may declare the child abandoned by the parent.
- [8] Father contends that the trial court erred when it concluded both that he had abandoned Child and that he had failed without justifiable cause to communicate significantly with Child for at least one year. Because the statute

is written in the disjunctive, any one of the grounds listed therein is alone sufficient to dispense with parental consent. *N.R. v. K.G. (In re Adoption of O.R.)*, 16 N.E.3d 965, 973 (Ind. 2014). Here, as we explain below, the trial court properly concluded that Father had abandoned Child for the six month period immediately preceding the filing of the adoption petition, and we need not address the court’s additional conclusion that, for a period of at least one year, Father failed without justifiable cause to communicate significantly with Child although he was able to do so. *See id.*

[9] 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.”” *R.S.P. v. S.S. (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)). Here, Father does not challenge any of the trial court’s findings on this issue. Accordingly, we must accept those findings as true. *M.M. v. A.C.*, 160 N.E.3d 1133, 1135 (Ind. Ct. App. 2020). Still, Father asserts that some of the court’s findings do not support its conclusion that he had abandoned Child, and he maintains that his efforts to maintain contact with Child during his incarceration were thwarted by Mother. But Father’s contentions amount to a request that we reweigh the evidence, which we cannot do.

[10] The trial court found, and it is undisputed, that Father was incarcerated during the six months prior to January 2019, when Stepfather filed his adoption petition. Father testified that, during those six months, he had attempted to

contact Child several times by calling Mother, but that Mother did not answer the phone. But the trial court found that Father's testimony on this issue was not credible. Father also testified that he did not know Mother's home address. However, as the trial court found, Father had previously sought the assistance of the dissolution court in facilitating contact with Child, but Father did not make any such effort during the six-month period relevant to the abandonment issue. Father does not explain his failure to attempt to contact Child through the dissolution court, or, for that matter, through Mother's attorney.¹ *See In re O.R.*, 16 N.E.3d at 974 (noting father could have attempted communication with child through either child's guardians' attorney or the trial court).

[11] We agree with Father that some of the trial court's findings are confusing, in that the court initially stated that Father did *not* abandon Child. But reading the court's order as a whole, it is clear that the court was merely pointing out that Father's stated *intent* to maintain contact with Child contradicted his *conduct* in failing to maintain contact with Child. As the court ultimately found, "Father's actions have been inconsistent with his expressed intent: he allowed more than eight months to pass without communication with the child." Appellant's App. Vol. 2 at 90. And the court's findings support the conclusion that Father had abandoned Child.

¹ We note that, after the adoption petition was filed, Father sent gifts for Child to Mother's attorney's office.

[12] In sum, the evidence most favorable to the judgment demonstrates that Father has not seen Child since February 2018. And while Father testified that he had attempted to contact Child by phone during his incarceration, the court found that Father was not credible. The trial court found that Father’s “lack of effort to communicate with the Child or petition the court to communicate with the child show an intention to abandon the child,” and the evidence supports that finding. *Id.* at 91. Father’s contentions on appeal amount to a request that we reweigh the evidence, which we cannot do. Again, we give “considerable deference” to the trial court’s decision here. *See In re I.B.*, 163 N.E.3d at 274. We hold that the trial court did not err when it found that Father had abandoned Child for the six months immediately preceding the adoption petition and that Father’s consent was not required for the adoption. *See K.S. v. D.S.*, 64 N.E.3d 1209, 1215 (Ind. Ct. App. 2016) (holding evidence sufficient to prove abandonment where Mother stopped visiting child and only made one attempt to talk to child and sent one card thereafter).

[13] Affirmed.

Weissmann, J., concurs.

Vaidik, J., concurs in result with separate opinion.

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20A-AD-2086

Vaidik, Judge, concurring in result.

[14] Given our standard of review and deference to the trial court in these matters, I concur in result. I do so not because Father abandoned Child but because there is evidence to support the trial court’s conclusion that he failed to significantly communicate with Child for one year.

[15] 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) (emphasis added), *trans. denied*. So unlike a claim that a parent

failed to significantly communicate with their child for one year, a claim that a parent abandoned their child requires a showing of intent. Here, the trial court repeatedly found Father did not intend to abandon Child, and I cannot reconcile these findings with its ultimate conclusion that Father did abandon Child. However, the trial court also found that Father failed to communicate at all with Child from February 2018 to January 2019, and that his contacts in the month before this period were not significant. Because there is evidence to support these findings, I vote to affirm the trial court's decision on this ground.