MEMORANDUM DECISION

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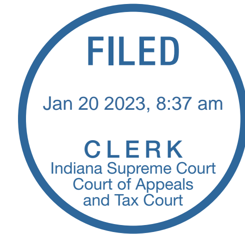

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IN THE COURT OF APPEALS OF INDIANA

In the Matter of the Adoption of L.B.,

R.B.,

Appellant-Respondent,

v.

B.P.,

Appellee-Petitioner.

January 20, 2023

Court of Appeals Case No. 22A-AD-1260

Appeal from the Vanderburgh Superior Court

The Honorable Renee A. Ferguson, Magistrate

Trial Court Cause No. 82D04-2012-AD-169

Robb, Judge.

Case Summary and Issue

[1] R.B. ("Father") and M.P. ("Mother") are the biological parents of L.B. ("Child"), born in 2008. Mother and Father have never been married and ended

their relationship in 2010. Mother is now married to B.P. ("Stepfather"). Stepfather filed a petition to adopt Child. Father filed an objection to the adoption. Following a hearing, the trial court issued Findings of Fact and Conclusions of Law determining that Father's consent to the adoption was not required. Subsequently, the trial court granted Stepfather's petition to adopt.

[2] Father now appeals raising multiple issues for our review, which we consolidate and restate as whether Father's consent to the adoption was necessary. Concluding that Father's consent to the adoption was not necessary, we affirm.

Facts and Procedural History

[3] On December 18, 2008, Child was born to Mother and Father. Mother and Father cohabitated but never married. In 2010, they ended their relationship. After Mother and Father's separation, Father has been continuously incarcerated for various criminal offenses including intimidation, possession of methamphetamine, possession of paraphernalia, possession of a chemical solution, possession with the intent to manufacture, false informing, and dealing in methamphetamine.

[4] On December 19, 2019, Mother married Stepfather. In 2020, Stepfather filed a petition to adopt Child which was served on Father the same day. In his petition, Stepfather alleged that Father's consent to the adoption was not required. Subsequently, Father filed an objection to the petition. On July 14, 2021, and February 2, 2022, the trial court held consent hearings in which

Father participated via telephone because at the time of the consent hearings Father was incarcerated with a release date, at the earliest, of May 9, 2024.

[5] Following the consent hearings, the trial court ordered the parties to submit proposed Findings of Fact and Conclusions of Law. On April 4, 2022, the trial court adopted Stepfather's Findings of Fact and Conclusions of Law and made the following conclusions:

> 4. Pursuant to IC 31-19-9-8(a)(2)(A) [Stepfather] has met his burden by clear and convincing evidence that . . . [Father] fail[ed] to communicate significantly, or at all, for years at a time, since November 2013 when he was able to do so and did not do so without justifiable cause.
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> 5. Pursuant to IC 31-19-9-8(a)(11) [Stepfather] has met his burden by clear and convincing evidence that [Father] is unfit and dispensing with his consent is in the best interest of [Child].

Appealed Order (Consent Hearing) at 6-7. Accordingly, the trial court determined that Father's consent to the adoption was not required. The trial court then granted Stepfather's petition for adoption. *See* Appealed Order (Adoption Decree) at 1-3.

[6] Father now appeals. Additional facts will be provided as necessary.

Discussion and Decision[1]

I. Consent to Adoption

[7] We will not disturb the trial court's decision in an adoption proceeding unless the evidence leads only to a conclusion opposite that reached by the trial court. *In re Adoption of Childers*, 441 N.E.2d 976, 978 (Ind. Ct. App. 1982). We will not reweigh the evidence; rather, we 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. *Id.* Further, 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 M.L.*, 973 N.E.2d 1216, 1222 (Ind. Ct. App. 2012).

[8] Moreover, where, as here, the trial court enters specific findings of fact and conclusions thereon, we apply a two-tiered standard of review: we first determine whether the evidence supports the findings and second, whether the findings support the judgment. *In re Adoption of T.W.*, 859 N.E.2d 1215, 1217 (Ind. Ct. App. 2006). "The trial court's findings of fact are clearly erroneous if

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[1] Father also argues that the trial court erred by adopting Stepfather's proposed Findings of Fact and Conclusions of Law. However, our supreme court has stated that "[i]t is not uncommon for a trial court to enter findings that are verbatim reproductions of submissions by the prevailing party." *Prowell v. State*, 741 N.E.2d 704, 708 (Ind. 2001). The practice of adopting a party's proposed findings is not prohibited. *In re Marriage of Nickels*, 834 N.E.2d 1091, 1096 (Ind. Ct. App. 2005). Although the practice is not encouraged, the critical inquiry is whether such findings, as adopted by the court, are clearly erroneous. *Id.* Here, Father fails to demonstrate that the adopted findings are clearly erroneous. Accordingly, we conclude the trial court did not err.

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.* (citation omitted).

[9] If a petition for adoption alleges that a biological parent's consent is unnecessary under these circumstances, and the biological parent contests the adoption, the petitioner carries the burden of proving that the biological parent's consent is unnecessary. Ind. Code § 31-19-10-1.2(a). The party bearing this burden must prove his or her case by clear and convincing evidence. Ind. Code § 31-19-10-0.5.

[10] Father argues the trial court erred in determining that his consent to the adoption was not necessary. Generally, a petition to adopt a minor child may be granted only if written consent to adopt has been provided by the biological parents. *See* Ind. Code § 31-19-9-1. However, Indiana Code section 31-19-9-8(a) states that consent to adoption is not required in a variety of circumstances. Here, the trial court determined that Father's consent was not required, in part, pursuant to Indiana Code section 31-19-9-8(a)(2)(A), under which consent to adoption is not required from the "parent of a child in the custody of another person if for a period of at least one (1) year the parent . . . fails without justifiable cause to communicate significantly with the child when able to do so[.]"

II. Failure to Significantly Communicate[2]

A. Lack of Communication

[11] Father contends that "Stepfather failed to prove by clear and convincing evidence that Father failed to communicate significantly for a period of one year." Brief of Appellant at 26 (emphasis omitted). "A determination on the significance of the communication is not one that can be mathematically calculated to precision." *E.B.F. v. D.F.*, 93 N.E.3d 759, 763 (Ind. 2018). Indeed, "[e]ven multiple and relatively consistent contacts may not be found significant in context." *Id*. 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." *Id*.

[12] The trial court found the following communication attempts were made by Father:

- 2012 – no visits or communication
- 2013 – saw Child around five times with the last time being Thanksgiving 2013 when he did not speak to Child

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[2] Father also argues that the trial court erred by determining that his consent was unnecessary because he was an unfit parent under Indiana Code section 31-19-9-8(a)(11). Because Indiana Code section 31-19-9-8 is written in the disjunctive, any one of the grounds listed therein is alone sufficient to dispense with parental consent. *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 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. Therefore, we need not address the court's additional conclusion that Father is unfit to be a parent to Child. *See id.*

- 2014 – no visits or communication
- 2015 – Mother received two or three letters from Father but nothing for Child
- 2016 – Mother received one phone call from Father in the summer
- 2017 – no visits or communication
- 2018 – no visits or communication
- 2019 – no visits or communication
- 2020 – multiple phone calls, video call where Father briefly saw Child, and seventy-nine text messages sent from Father to Mother
- 2021 – no visits or communication

Appealed Order (Consent Hearing) 3-4.

[13] In his brief, Father attempts to clarify his communication attempts in 2015, 2016 and 2020, but he does not argue that any attempts or actual communication with Child occurred between 2016 and 2020. We have stated that "[i]t is not necessary that the period of non-communication be the year immediately prior to the filing of an adoption-termination petition." *Matter of Adoption of Ryan L.*, 435 N.E.2d 624, 626 (Ind. Ct. App. 1982). Accordingly, we conclude the trial court did not err in determining that there was a period of at

least one year in which Father did not have significant communication with Child.

B. Ability to Communicate

[14] Father also argues that he did not have "the ability to communicate significantly during any one year period." Br. of Appellant at 29 (emphasis omitted). Father contends that his imprisonment and Mother's interference impeded his ability to communicate with Child but that he "made a reasonable effort to communicate when he was able to do so." *Id.* at 30.

[15] On appeal, we must consider the facts and circumstances of the particular case, including, for example, "the custodial parent's willingness to permit visitation as well as the natural parent's financial and physical means to accomplish his obligations." *In re Adoption of C.E.N.*, 847 N.E.2d 267, 271-72 (Ind. Ct. App. 2006). "Efforts of a custodial parent to hamper or thwart communication between a parent and child are relevant in determining the ability to communicate." *In re Adoption of A.K.S.*, 713 N.E.2d 896, 899 (Ind. Ct. App. 1999), *trans. denied.* Further, Father's communication

> must be viewed in the context of his incarceration. Imprisonment standing alone does not establish statutory abandonment. Neither should confinement alone constitute justifiable reason for failing to maintain significant communication with one's child.

In re Adoption of E.A., 43 N.E.3d 592, 598 (Ind. Ct. App. 2015) (internal citation omitted), *trans. denied.*

[16] Father presented evidence demonstrating that he attempted to reach Child through Mother while he was imprisoned. *See* Exhibits, Volume III at 156-70; Transcript, Volume II at 63, 86, 104-06, 124-25. However, as above, Father presented no evidence that any form of communication was attempted between when he called Mother in 2016 and when he began communicating with her again in 2020. *See In re Adoption of O.R.*, 16 N.E.3d 965, 974 (Ind. 2014) (finding father was not unable to communicate when father admitted "that while incarcerated over the last several years, he has never attempted to write [Child] a letter or to communicate with her in any other way"); *see also In re Adoption of T.W.*, 859 N.E.2d at 1218 (finding that father's efforts to communicate while imprisoned were not thwarted when the "record does not demonstrate that [father] actually tried to write to the Children or telephone them").

[17] Therefore, we conclude the facts do not demonstrate that Father was unable to communicate but rather demonstrate that he chose not to.

C. Justifiable Cause

[18] Father contends that any failure he had to communicate was justifiable. Specifically, Father contends that his failure to significantly communicate is justifiable under Indiana Code section 31-19-10-1.4(b).[3] Pursuant to Indiana

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[3] Stepfather argues that because Indiana Code section 31-19-10-1.4(b) was not effective until July 1, 2021, it cannot be considered as grounds for justifiable cause. Here, Stepfather filed his petition for adoption on December 18, 2020, and the trial court held its first hearing regarding Father's consent on July 14, 2021. The general rule is that unless there are strong and compelling reasons, a statute will not be applied retroactively. *Bourbon Mini-Mart, Inc. v. Gast Fuel and Servs., Inc.*, 783 N.E.2d 253, 260 (Ind. 2003). Ultimately, whether a

Code section 31-19-10-1.4(b), if a petition for adoption alleges that a parent's consent to the adoption is unnecessary, the court may consider:

> (1) the parent's substance abuse;
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> (2) the parent's voluntary unemployment; or
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> (3) instability of the parent's household caused by a family or household member of the parent;
>
> as justifiable cause for the parent's . . . failure to communicate significantly with the child . . . if the parent has made substantial and continuing progress in remedying the [above] factors . . . and it appears reasonably likely that progress will continue.

[19] Father argues that the primary cause of his separation from Child was his substance abuse.[4] Father claims that after years of addiction he had been clean for two years at the time of the consent hearing and therefore his lack of communication was justifiable under Indiana Code section 31-19-10-1.4.

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statute applies retroactively depends on the Legislature's intent. *Id.* Prior to the amendment, Indiana Code section 31-19-10-1.4 provided that the trial court "shall consider all relevant evidence[.]" Thus, the factors enumerated in 31-19-10-1.4(b) as potential justifiable causes for failing to communicate would already have been considered by the trial court regardless of the amendment. Further, the amendment states that the trial court "may" consider the factors as justifiable causes, it does mandate anything new of the trial court. Accordingly, we conclude the trial court could have considered the amendment when determining whether Father's consent was required. *See D.G. v. D.H.*, 182 N.E.3d 247, 253 (Ind. Ct. App. 2022) (referencing evidence presented in consideration of Indiana Code section 31-19-10-1.4(b) six weeks prior to the statute being in effect).

[4] Father also includes his incarceration as a primary cause for his separation from Child and argues that his lack of communication was justifiable because "with the best interests of his daughter in mind, he agreed with Mother that [Child should] not come to the prison to see him." Br. of Appellant at 34. However, incarceration is not listed as a specific potential justifiable cause for a lack of communication under Indiana Code section 31-19-10-1.4(b). Father's incarceration is addressed in the ability to communicate subsection.

However, Indiana Code section 31-19-10-1.4(b) provides that the trial court "may" consider a parent's substance abuse as justifiable cause for the failure to communicate significantly. It does not require the trial court to do so. Father's argument is essentially a request to reweigh the evidence, which we will not do. *In re Adoption of Childers*, 441 N.E.2d at 978.

[20] Based upon the record before us there was clear and convincing evidence before the trial court that Child was "in the custody of another person [and] for a period of at least one (1) year [Father] . . . fail[ed] without justifiable cause to communicate significantly with [Child] when able to do so." Ind. Code § 31-19-9-8(a)(2)(A). Father's consent to the adoption of Child was therefore not required.

Conclusion

[21] We conclude that Father's consent to the adoption was not required. Accordingly, we affirm.

[22] Affirmed.

Mathias, J., and Foley, J., concur.