MEMORANDUM DECISION

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IN THE COURT OF APPEALS OF INDIANA

In the Matter of the Adoption of H.H. (Minor Child):

E.F.

Appellant-Petitioner,

v.

B.H.,

Appellee-Respondent.

December 1, 2022

Court of Appeals Case No. 22A-AD-1154

Appeal from the Johnson Superior Court

The Honorable Kevin M. Barton, Judge

Trial Court Cause No. 41D01-2108-AD-74

Weissmann, Judge.

[1] L.H. (Mother) and B.F. (Father) divorced shortly after the birth of their child, H.H. (Child). Mother then became engaged to marry E.F., who petitioned to adopt Child without Father's consent. E.F. argued in relevant part that Father's consent was unnecessary under Indiana Code § 31-19-9-8(a)(2), alleging that Father failed to provide for the care and support of Child. At the adoption hearing, after E.F. presented evidence of Father's income and expenses, Father moved for an involuntary dismissal of E.F.'s adoption petition, claiming E.F.'s evidence did not establish Father's ability to financially support Child. The trial court agreed, specifically finding that E.F. presented "no evidence" of Father's expenses. Because this finding is clearly erroneous, we reverse and remand.

Facts

[2] Soon after Child's birth in 2019, Mother filed for divorce from Father. The dissolution court dissolved their marriage, approved their property settlement, and set the custody, parenting time, and support issues for final hearing. But to date, no preliminary hearing resolving these issues has been held.

[3] Mother and E.F. became engaged in 2021. Later that year, with Mother's consent, E.F. petitioned to adopt Child. He filed his petition in a different court in the same county where the dissolution action was pending. It alleged Father's consent to the adoption was unnecessary because Father failed to financially support Child while able to do so. Father objected to the adoption. The dissolution court, which had not yet conducted a final hearing on the child-

related issues, transferred the dissolution action to the adoption court.[1] The adoption court accepted the case but chose to hear the adoption matters first.

[4] At the adoption hearing, E.F. first presented evidence of Father's financial absence. Since the divorce, Father had not paid child support, despite his steady employment. During the prior three years, his pay increased from $16 per hour to $22 per hour. At his current job as a retail manager of an AT&T store, Father also receives monthly sales commissions. As far as expenses, the evidence showed Father paid monthly around $750 in rent and $500 for his car loan. The evidence did not reveal the amounts of his other expenses, which included attorney's fees and general living expenses.

[5] After E.F. presented this evidence, Father moved for an involuntary dismissal under Indiana Trial Rule 41(B)[2], arguing that E.F. did not establish Father's ability to support Child. The trial court agreed and granted the motion. The hearing, however, continued so that Father could rebut E.F.'s evidence on whether Father had failed to significantly communicate with Child since the divorce.

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[1] Just before the transfer, Father requested the dissolution court set an expedited preliminary hearing on temporary custody, parenting time, and child support issues. A day later, the dissolution court transferred the dissolution case to the adoption court, which then denied Father's request for the preliminary hearing.

[2] At the hearing, Father requested a "judgment on the evidence," under Indiana Trial Rule 50. Tr. Vol. II, p. 67. Such relief is unavailable in a proceeding without a jury. *Michael v. Wolfe*, 737 N.E.2d 820, 822 (Ind. Ct. App. 2000) ("[A judgment on the evidence] addresses the issue of whether there is sufficient evidence to justify submitting the case to a jury."). When this error occurs, we treat the motion as if the movant had requested involuntary dismissal under Trial Rule 41. *Id.* (citing *Plesha v. Edmonds ex rel. Edmonds*, 717 N.E.2d 981, 985 (Ind. Ct. App. 1999)).

[6] In its subsequent findings of fact and conclusions of law, the adoption court determined that E.F. presented "no evidence" of Father's expenses and that, since the court also found Father significantly communicated with Child, such evidence was necessary to negate the need for Father's consent. App. Vol. II, p. 6. E.F. appeals this finding.[3]

Discussion and Decision

[7] E.F. argues that the trial court erred in finding he provided no evidence of Father's financial expenses. We agree and reverse the trial court's ruling as unsupported by the evidence while remanding for further proceedings consistent with this opinion.

I. Standard of Review

[8] The parent-child relationship is "an important interest warranting deference and protection." *In re C.G.*, 954 N.E.2d 910, 916-17 (Ind. 2011). Accordingly, a finding that parental consent is necessary for an adoption petition is not lightly reversed. We presume on appeal that the adoption court's ruling is correct. *In re Adoption of S.W.*, 979 N.E.2d 633, 639 (Ind. Ct. App. 2012). The appellant bears the burden of overcoming this presumption. *Id.* We neither reweigh the evidence nor judge the credibility of witnesses. *Id.* We consider all evidence,

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[3] E.F. does not challenge the trial court's conclusion that Father did not fail to significantly communicate with Child when able to do so. *See* App. Vol. II, pp. 7-15 (ruling on Ind. Code § 31-19-9-8(a)(2)(A)). E.F. need only succeed on one of the exceptions in Indiana Code § 31-19-9-8(a)(2) to render Father's consent to the adoption unnecessary. *In re Adoption of O.R.*, 16 N.E.3d 965, 973 (Ind. 2014) ("[T]he existence of any one of the circumstances [in Subsection (a)(2)] provides sufficient ground to dispense with consent.").

and reasonable inferences from the evidence, in the light most favorable to sustaining the trial court's decision. *Id.* "We will not disturb the trial court's ruling unless the evidence leads to only one conclusion and [the court] reached an opposite conclusion." *Id.*

[9] Following an involuntary dismissal "against the plaintiff or party with the burden of proof," the court will make findings of fact and conclusions of law as required by Rule 52(A) when requested to do so by a party. Ind. Trial Rule 41(B). The involuntary dismissal "operates as an adjudication upon the merits" unless otherwise noted. *Id.* These specific findings of fact and conclusions of law are reviewed under a two-tiered standard of review:

> First, we determine whether the evidence supports the findings and second, whether the findings support the judgment. The trial court's findings or conclusions will be set aside only if they are clearly erroneous. A finding of fact is clearly erroneous if the record lacks evidence or reasonable inferences from the evidence to support it.

In re Adoption of I.B., 185 N.E.3d 428, 431 (Ind. Ct. App. 2022) (internal citations omitted).

II. Clear Error

[10] Parental consent to an adoption is required in Indiana unless one of several statutory exceptions exist. *See* Ind. Code § 31-19-9-1. One such exception applies when the parent "knowingly fails to provide for the care and support of the child when able to do so as required by law or judicial decree" for at least

one year. Ind Code § 31-19-9-8(a)(2)(B). Determination of the parent's ability to provide support is based on the totality of the circumstances. *In re Adoption of J.L.J.*, 4 N.E.3d 1189, 1195 (Ind. Ct. App. 2014), *trans. denied*. The person seeking to adopt must provide evidence of the parent's income and expenses to prove refusal to support. *In re Adoption of Augustyniak*, 508 N.E.2d 1307, 1308 (Ind. Ct. App. 1987). A petitioner must prove by clear and convincing evidence that this statutory exception applies. *In re Adoption of M.B.*, 944 N.E.2d 73, 77 (Ind. Ct. App. 2011).

[11] The trial court found that Father did not knowingly fail to provide and care for Child because E.F. presented "no evidence of [Father's] expenses." App. Vol. II, p. 6. This finding is clearly erroneous. Father testified to paying $750 in rent per month, $500 in monthly car payments, and unspecified amounts for attorney's fees, alcohol, and general living expenses such as apartment furnishings. Tr. Vol II, pp. 53-54. The trial court directly acknowledged this evidence at the hearing:

> Well, I'm going to grant [Father's motion for involuntary dismissal]. Yes, [a parent's duty to support the child] can be based upon common law, so, that's true. The *Augustyniak* decision basically says that there has to be evidence presented as to income and expenses. I've had evidence as to the income, the expenses though I've heard basically rent, I've heard a car payment. The rent was placed at $750 a month, car payment at $500 a month. There was a question about alcohol, a question about attorney's fees, but neither of those were confirmed as to amounts. So basically I have evidence as to two types of expenses, but, you know, obviously I think I can take judicial notice that there's a whole myriad of expenses that potentially

> would be subject to and that could . . . provide a basis under the *Augustyniak* standard. In fact, I mean, the Court of Appeals basically says you have to have the evidence as to the expenses. So under that decision, I will grant.

Id. at 68. Because the court noted evidence of Father's rent and car expenses the trial court clearly erred in finding "no evidence" of Father's expenses.

[12] In response, Father argues that courts "strictly" require proof of the parent's ability to provide child support alongside the willful failure to do so. Appellee's Br., pp. 17-18. Although true, Father stretches this requirement. In an analogous case, *In re Adoption of J.T.A.*, the evidence presented of the parent's inability to provide child support was not just insufficient—it was completely absent from the record. 988 N.E.2d 1250, 1255 (Ind. Ct. App. 2013). "The record does not indicate that [the parent's] ability to pay was ever investigated, much less determined, and consequently Fiancée failed to carry her burden of proof." *Id.* Similarly, parental consent to an adoption has not been required when evidence amounted solely to testimony that the parent "had money to buy cigarettes and gas." *Matter of Adoption of D.H. III*, 439 N.E.2d 1376, 1377 (Ind. Ct. App. 1982).

[13] In contrast, here the evidence of Father's ability to pay was established directly from Father's own testimony and included specific information on both his income and expenses. For instance, E.F. elicited detailed information on Father's income since the divorce, including his hourly wage, between $16 to $22, and that he had been consistently employed. *See* Tr. Vol. II, pp 50-51.

Father testified the specific amounts of his rent, $750, and car payments, $500, alongside general living expenses. *See id.* at 53-55. This evidence suggests Father was capable of independently supporting himself. When "the evidence shows that a parent is 'capable of financing his own independent living,' we are disinclined to believe that he or she is unable to provide child support." *In re Adoption of E.B.*, 163 N.E.3d 931, 938 (Ind. Ct. App. 2021) (quoting *In re Adoption of J.L.J.*, 4 N.E.3d at 1197). Viewed from this presumption, E.F. presented sufficient evidence to meet his burden that Father knowingly failed to provide for Child.

[14] The existence of these facts in the record shows that the trial court clearly erred in granting the involuntary dismissal because E.F. provided proof of Father's income and expenses sufficient to meet his burden. *See In re Adoption of M.S.*, 10 N.E.3d 1272, 1280-81 (Ind. Ct. App. 2014) (holding parent's consent to adoption unnecessary when presented with evidence of income and expenses and the parent's failure to support the child while able to do so).

[15] Under our two-tiered standard of review, the evidence does not support the trial court's finding that E.F. provided no evidence of Father's expenses. Accordingly, we reverse and remand for the trial court to hold a new hearing, at which Father may present evidence rebutting E.F.'s claim that Father failed to support Child.

May, J., and Crone, J., concur.