

## MEMORANDUM DECISION

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## IN THE COURT OF APPEALS OF INDIANA

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In the Matter of the Adoption of  
T.K.;  
K.W.,  
*Appellant-Respondent,*

v.

M.N.,  
*Appellee-Petitioner.*

January 30, 2023

Court of Appeals Case No.  
22A-AD-1421

Appeal from the Dubois Circuit  
Court

The Honorable Nathan A.  
Verkamp, Judge

Trial Court Cause No.  
19C01-2010-AD-21

### Opinion by Judge Tavitas

Chief Judge Altice and Judge Brown concur.

## Case Summary

- [1] The trial court granted a petition filed by M.N. (“Stepmother”) to adopt T.K. (“Child”), the minor daughter of Stepmother’s husband, K.K. (“Father”). Child’s biological mother, K.W. (“Mother”) appeals and claims that: (1) the trial court clearly erred in determining that Mother’s consent to the adoption was not required, and (2) the trial court failed to comply with the statutory requirement that a criminal history check be performed on the person seeking adoption.<sup>1</sup> We conclude the trial court’s finding that Mother’s consent was not required due to her lack of communication with Child was supported by sufficient evidence. We do, however, agree with Mother that the trial court failed to comply with the statutory requirement that Stepmother undergo a criminal background check. We, therefore, affirm in part, reverse in part, and remand with instructions that the trial court comply with this requirement.

## Issues

- [2] Mother presents three issues, which we consolidate, reorder, and restate as:
- I. Whether the trial court’s finding that Mother’s consent was not required due to Mother’s lack of communication with Child was supported by sufficient evidence.

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<sup>1</sup> Mother also claims the trial court erred by concluding that Mother’s consent to the adoption was irrevocably revoked pursuant to Indiana Code Section 31-19-9-18. Because we conclude that there was sufficient evidence to support the trial court’s conclusion that Mother’s consent was not required due to her failure to communicate with Child, we need not address Mother’s argument that her consent was not irrevocably revoked.

- II. Whether the trial court erred by failing to require Stepmother to undergo a criminal history check as required by Indiana Code Section 31-19-8-5.

## Facts

- [3] Child was born in June 2016. On March 9, 2017, Father was awarded primary physical custody of Child in a paternity action.<sup>2</sup> Pursuant to the custody order, Father and Mother shared joint legal custody, and Mother was granted parenting time pursuant to the Indiana Parenting Time Guidelines, but without overnight visitation. Mother was not ordered to pay child support.
- [4] Mother exercised parenting time for only three months and stopped regularly seeing Child after Child was approximately eight months old. Father offered Mother parenting time; however, due to Father's busy work schedule, Mother was unable to exercise her parenting time on several occasions. Mother has not visited or had any contact with Child since August 2018. Mother claims that this was due to her dealing with a child-in-need-of services ("CHINS") case involving her two other children. Mother also claims that Father denied her parenting time, but she admitted that the last time this occurred was in 2017. Despite Mother's claims to the contrary, Stepmother testified that no one was stopping Mother from seeing Child. Nor did Mother file any action to enforce her visitation rights in the paternity action. Mother provided no financial

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<sup>2</sup> The trial court's adoption order refers to the decree in the paternity case. Mother notes that a copy of the paternity order was not entered into the record in this case. We observe, however, that Evidence Rule 201, as amended in 2010, "now permits courts to take judicial notice of 'records of a court of this state,'" which is what the trial court did here. *Horton v. State*, 51 N.E.3d 1154, 1160 (Ind. 2016) (quoting Evid. R. 201(b)(5)).

support to Child and did not provide her with any gifts or presents until after Stepmother filed the petition to adopt Child. Mother claimed that she did not contact Child because she wanted to avoid conflict with Father.

[5] Father began to date Stepmother in 2018, and the couple began cohabiting when Child was approximately two and one-half years old. Father and Stepmother were married on February 20, 2021. After Father began his relationship with Stepmother, Father blocked Mother on Facebook, but Mother was still able to contact Father on his cell phone. Stepmother became a mother figure to Child, and Child refers to Stepmother as “mommy.” Tr. Vol. II p. 24. Child is not bonded to Mother, and, during a text conversation with Stepmother, Mother admitted that Child would not even recognize her.<sup>3</sup>

[6] On October 5, 2020, Stepmother filed a verified petition to adopt Child along with a motion to waive the supervision period and written adoption report. The trial court initially set a hearing on the matter for November 13, 2020, but due to issues with service, reset the matter for a hearing on December 18, 2020. On November 13, 2020, the trial court issued an order to appear, which was served on Mother. Mother appeared at the December 18, 2020 hearing and, when asked by the trial court if she was contesting the adoption, replied, “Yes.” Supp. Tr. p. 4. The trial court then appointed counsel for Mother and reset the hearing for a later date. After numerous continuances, the trial court held an

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<sup>3</sup> Mother backed away from this statement at the adoption hearing and testified that she believed Child would recognize her.

evidentiary hearing on the adoption petition on May 16, 2022. On May 23, 2022, the trial court granted the petition and entered an order and decree of adoption. Mother now appeals.

## Discussion and Decision

### *Standard of Review*

[7] Our Supreme Court has explained that appellate courts should “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.’” *In re Adoption of I.B.*, 163 N.E.3d 270, 274 (Ind. 2021) (quoting *E.B.F. v. D.F.*, 93 N.E.3d 759, 762 (Ind. 2018)). “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.* (quoting *E.B.F.*, 93 N.E.3d at 762). “[W]e will not disturb that decision ‘unless the evidence leads to but one conclusion and the trial judge reached an opposite conclusion.’” *Id.* (quoting *In re Adoption of T.L.*, 4 N.E.3d 658, 662 (Ind. 2014)). On appeal, we will neither reweigh evidence nor assess the credibility of witnesses; instead, we consider the evidence in the light most favorable to the trial court’s decision. *Id.* (citing *T.L.*, 4 N.E.3d at 662).

[8] Here, our standard of review is somewhat altered by the fact that Stepmother has not filed an appellee’s brief. Where the appellee does not submit a brief on

appeal, we need not develop an argument for the appellee but instead will reverse the trial court's judgment if the appellant's brief presents a case of "prima facie error." *Salyer v. Washington Regular Baptist Church Cemetery*, 141 N.E.3d 384, 386 (Ind. 2020) (citing *Front Row Motors, LLC v. Jones*, 5 N.E.3d 753, 758 (Ind. 2014)). "Prima facie error in this context means 'at first sight, on first appearance, or on the face of it.'" *Id.* (quoting *Front Row Motors*, 5 N.E.3d at 758). "This less stringent standard of review 'relieves [us] of the burden of controverting arguments advanced in favor of reversal where that burden properly rests with the appellee.'" *In re Adoption of E.B.*, 163 N.E.3d 931, 935 (Ind. Ct. App. 2021) (quoting *Jenkins v. Jenkins*, 17 N.E.3d 350, 352 (Ind. Ct. App. 2014)). Still, we are obligated to correctly apply the law to the facts in the record in order to determine whether reversal is required. *Id.* (citing *Jenkins*, 17 N.E.3d at 352).

### ***I. Mother's Consent was Not Required***

- [9] Mother claims the trial court erred by concluding that Mother's consent to the adoption was not required pursuant to Indiana Code Section 31-19-9-8 as a result of Mother's failure to communicate with Child. Our Supreme Court has held that "[a] natural parent enjoys special protection in any adoption proceeding," and we "strictly construe our adoption statutes to preserve the fundamentally important parent-child relationship." *I.B.*, 163 N.E.3d at 274. In general, "a petition to adopt a child who is less than eighteen (18) years of age may be granted only if written consent to adoption has been executed by . . . [t]he mother of a child born out of wedlock and the father of a child whose

paternity has been established . . . .” Ind. Code § 31-19-9-1(a)(2). “[U]nder carefully enumerated circumstances,” however, the adoption statutes allow “the trial court to dispense with parental consent and allow adoption of the child.” *I.B.*, 163 N.E.3d at 274 (citing Ind. Code ch. 31-19-9). Indiana Code Section 31-19-9-8 provides in relevant part:

(a) Consent to adoption, which may be required under section 1 of this chapter, is not required from any of the following:

(1) A parent or parents if the child is adjudged to have been abandoned or deserted for at least six (6) months immediately preceding the date of the filing of the petition for adoption.

**(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.**

\* \* \* \* \*

(b) If 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.

(emphasis added). As set forth in Indiana Code Section 31-19-10-1.4(b):

If a petition for adoption alleges that a parent's consent is unnecessary under Indiana Code 31-19-9-8, and that parent files a motion to contest the adoption, the court may consider:

- (1) the parent's substance abuse;
- (2) the parent's voluntary unemployment; or
- (3) instability of the parent's household caused by a family or household member of the parent;

as justifiable cause for the parent's abandonment or desertion of the child as described in IC 31-19-9-8(a)(1), failure to communicate significantly with the child as described in IC 31-19-9-8(a)(2)(A), or failure to provide for the care and support of the child as described in IC 31-19-9-8(a)(2)(B), if the parent has made substantial and continuing progress in remedying the factors in subdivisions (1), (2), and (3), and it appears reasonably likely that progress will continue.

[10] “If a petition for adoption alleges that a natural parent’s consent is unnecessary under these circumstances, and the natural parent contests the adoption, the petitioner carries the burden of proving that the natural parent’s consent is unnecessary.” *I.B.*, 163 N.E.3d at 274 (citing I.C. § 31-19-10-1.2(a)). “The party bearing this burden must prove his or her case by clear and convincing evidence.” *Id.* “Indiana Code section 31-19-9-8(a) is written in the disjunctive, so each of the sub-sections provides an independent ground for dispensing with consent.” *Id.* at 275.

[11] In the present case, the trial court found that Mother had failed to communicate with Child without justifiable cause despite being able to do so. Mother claims that the trial court’s finding is unsupported by the evidence. But Mother simply



points to the evidence that is not favorable to the trial court's decision and asks us to credit her testimony, which we may not do. *See I.B.*, 163 N.E.3d at 274.

[12] The facts favorable to the trial court's judgment show that Mother had no contact with Child since 2018. Although Mother claims Father denied her parenting time, Mother admitted that the last time this occurred was in 2017. Mother also never attempted to judicially enforce her parenting rights. Instead, Mother chose to focus her efforts on maintaining rights to her two other children, who were the subject of a CHINS case. Father did block Mother on Facebook, but Mother was still able to contact him by phone and contacted him by phone in 2021. Mother also knew where Father lived, yet still made no effort to contact Child for over two years. Stepmother testified that neither she nor Father prevented Mother from communicating with Child.

[13] Mother claims that the trial court improperly found that "[t]he record is devoid of evidence of Mother providing any gift or presents to her child during this period." Appellant's App. Vol. II p. 11. Mother refers to her own testimony that she tried to give Child Christmas presents in 2021. The trial court was, of course, free to discredit Mother's testimony. But even if the trial court believed Mother, her attempt to give Child Christmas presents occurred in 2021, well after Stepmother filed her petition for adoption. "[A] parent's conduct after the petition to adopt [is] filed is 'wholly irrelevant to the determination of whether the parent failed to significantly communicate with the child for any one year period.'" *In re Adoption of S.W.*, 979 N.E.2d 633, 640 n.3 (Ind. Ct. App. 2012) (quoting *In re Adoption of Subzda*, 562 N.E.2d 745, 750 n.3 (Ind. Ct. App. 1990)).

[14] Mother's reliance on *E.B.F. v. D.F.*, 93 N.E.3d 759 (Ind. 2018), is unavailing. In that case, a majority of our Supreme Court held that the mother's addiction issues, her willingness to give up custody after caring for child for ten years, and her good-faith efforts at recovery all justified the mother's failure to communicate with her child for a one-year period. *Id.* at 767. Moreover, in that case, the father and stepmother admittedly thwarted the mother's few attempts to communicate with her child, which was in violation of the agreed-upon custody modification order. *Id.* Under those circumstances, the Court held that the mother's consent was necessary.<sup>4</sup> *Id.*

[15] Here, however, Mother had no communication with Child since 2018. Mother admitted that the last time Father denied her visitation with Child was in 2017. And although Mother was focusing her efforts on the CHINS case involving her other two children, there is no evidence that this somehow prevented her from communicating with Child in any manner. Under these facts and circumstances, we do not find *E.B.F.* to be controlling. Instead, we conclude that the evidence supports the trial court's finding that Mother, without justification, failed to communicate with Child for a period of well over one year. *See M.M. v. A.C.*, 160 N.E.3d 1133, 1138 (Ind. Ct. App. 2020) (evidence was sufficient to support trial court's determination that mother failed to communicate with her child for over one year without justifiable cause where mother last saw the children over three years before the adoption petition was

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<sup>4</sup> Justices Slaughter and Massa dissented.

filed, mother had not called, visited, or sent birthday or holiday cards or presents during that time; stepmother testified that she and father permitted the children to see their maternal grandmother but mother never visited with the children during those visits; and father and stepmother did not prohibit mother from communicating with the children).

## ***II. Failure to Comply with Indiana Code Chapter 31-19-8***

[16] Mother also argues that the trial court's order granting the adoption petition was fatally deficient because the trial court failed to comply with the requirements of Indiana Code Chapter 31-19-8, the first section of which provides:

An adoption may be granted in Indiana only after:

- (1) the court has heard the evidence; and
- (2) except as provided in section 2(c) of this chapter, a period of supervision, as described in section 2 of this chapter, by:
  - (A) a licensed child placing agency for a child who has not been adjudicated to be a child in need of services; or
  - (B) the department [of child services], if the child is the subject of an open child in need of services action.

Ind. Code § 31-19-8-1. Section 2(c) provides:

(c) A court hearing a petition for adoption of a child may waive the period of supervision under subsection (a) **if one (1) of the petitioners is a stepparent or grandparent of the child and the court waives the report under section 5(c) of this chapter.**

Ind. Code § 31-19-8-2(c) (emphasis added). Section 5 of that chapter provides:

(a) Except as provided in subsection (c), not more than sixty (60) days from the date of reference of a petition for adoption to each appropriate agency:

- (1) each licensed child placing agency, for a child who is not adjudicated to be a child in need of services; or
- (2) if the child is the subject of an open child in need of services action, each local [DCS] office;

shall submit to the court a written report of the investigation and recommendation as to the advisability of the adoption.

(b) The report and recommendation:

- (1) shall be filed with the adoption proceedings; and
- (2) become a part of the proceedings.

**(c) A court hearing a petition for adoption of a child may waive the report required under subsection (a) if one (1) of the petitioners is a stepparent or grandparent of the child and the court waives the period of supervision.**

(d) If the court waives the reports required under subsection (a), the court **shall** require the licensed child placing agency for a child who is not adjudicated to be a child in need of services or, if the child is the subject of an open child in need of services action, each local [DCS] office to:

(1) **ensure a criminal history check is conducted under IC 31-19-2-7.5;**<sup>5</sup> and

(2) report to the court the results of the criminal history check.

Ind. Code § 31-19-8-5 (emphases added).

[17] Reading these statutes together, we see that, before a trial court may grant a petition for adoption, there must generally be a period of supervision by either a licensed child placing agency or, if the child is a CHINS, DCS. I.C. § 31-19-8-5. The exception to this general rule is found in Section 2, which provides that a court may waive the supervision period if one of the petitioners is a stepparent or grandparent of the child and the court waives the report generally required under Section 5(c). I.C. § 31-19-8-2(c). Under Section 5, a report from the licensed child placing agency or DCS is also generally required. However, under Section 5(c), the court may also waive this report if one of the petitioners is a stepparent or grandparent and the court has waived the supervision period. I.C. § 31-19-8-5(c). Importantly, even if the court waives the report under Section 5(c), the court **must** order a licensed child placement agency or local DCS office to conduct a criminal history check and report the results of that check to the court. *Id.* §5(d).

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<sup>5</sup> Indiana Code Section 31-19-2-7.5 provides that a criminal history check must be conducted in accordance with Indiana Code Section 31-9-2-22.5, which delineates the requirements of a criminal history check, including a fingerprint-based national criminal history check, a name-based national criminal history check, collection of any substantiated reports of child abuse or neglect, a check of the national sex offender registry, and a local criminal records check.

[18] In *In re Adoption of S.O.*, 56 N.E.3d 77, 81 (Ind. Ct. App. 2016), *trans. denied*, we considered these statutes and concluded that:

Our General Assembly has required that every adoption case—whether done by stepparent, blood relative, or a nonrelative—involve either a licensed child placing agency or DCS. In general, every petitioner must have such an agency complete the period of supervision along with a report. I.C. § 31-19-8-1. Although the supervisory period and report can be waived for stepparents or grandparents, I.C. § 31-19-8-5(c), exercising that waiver then obligates the court to order an agency to conduct a criminal history check and complete a report. I.C. § 31-19-8-5(d).

[19] In the present case, there is no indication in the record that the trial court waived either the supervision period under Section 2(c) or the adoption report under Section 5(c). Although Stepmother filed a motion asking the trial court to waive these requirements, neither the chronological case summary nor the record on appeal contain any indication that this motion was ever granted.<sup>6</sup> But even if the trial court did effectively waive these requirements by granting the adoption, Section 5(d) required that the court order a licensed child placing agency to conduct a criminal history check and report to the court the results of that check. This, however, never occurred.

[20] A similar situation occurred in *S.O.*, in which the trial court waived the supervision period and report requirements but the statutorily-mandated

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<sup>6</sup> It is worth noting that, at the time Stepmother filed her motion to waive the supervision period and report, she was not yet married to Father. Accordingly, she was not yet a “stepparent” as required by Sections 2(c) and 5(c). By the time evidence was heard on the adoption petition, however, Stepmother and Father were married.

criminal history check was not performed or reported to the trial court. 56 N.E.3d at 81. Instead, the trial court in that case determined that a self-produced criminal background check was sufficient. *Id.* On appeal, this court disagreed, writing: “We cannot find any statutory sanction for the proposition that one can waive all involvement of child placing agencies or DCS by providing the court with a self-produced report.” *Id.*

[21] We also held that the failure to abide by these statutory requirements was reversible error.

**[O]ur General Assembly has specifically legislated that “[a] court may not waive any criminal history check requirements set forth in this chapter.”** I.C. § 31-19-2-7.3. The requirement to get a [Section] 22.5 check comes from that same chapter. I.C. § 31-19-2-7.5. Given that our General Assembly has explicitly instructed that no part of a [Section] 22.5 check can be waived, and that the adoption court here has apparently waived all of the national components of the [Section] 22.5 check, we cannot say that the deficiencies in the criminal background check were harmless in this case.

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Our General Assembly was aware that we strictly construe the adoption statutes, and still took the time to reiterate that the [Section] 22.5 check cannot be waived. I.C. § 31-19-2-7.3. It follows that a criminal background check that complies with Indiana Code section 31-9-2-22.5 is an essential particular of the adoption process; **its absence renders an adoption petition fatally deficient.**

*S.O.*, 56 N.E.3d at 82-83 (emphases added).

[22] Here, as in *S.O.*, there was no involvement by either a licensed child placing agency or DCS. Even if the trial court could properly waive the supervision period and adoption report requirements—and there is no indication that the trial court here expressly did so—doing so required the court to order a criminal history check of Stepmother by such an agency and receive a report regarding that check. The absence of such a criminal history check is a fatal deficiency in an adoption. *Id.* at 83. Given the clear language of the controlling statutes, we conclude, as did the court in *S.O.*, that the failure of the trial court to order a criminal history check by a licensed child placing agency was fatally deficient to the adoption petition.

## Conclusion

[23] The trial court did not err by finding that Mother's consent to the adoption was not required due to her unjustified failure to communicate with Child for well over one year. We, however, agree with Mother that the trial court's failure to order a criminal history check of Stepmother was a fatal deficiency to the adoption petition. We, therefore, affirm the trial court's finding that Mother's consent to the adoption is not required, reverse the order of the trial court granting the adoption, and remand with instructions that the court order a criminal history check of Stepmother that complies with the requirement of the adoption statutes.

[24] Affirmed in part, reversed in part, and remanded.

Altice, C.J., and Brown, J., concur.