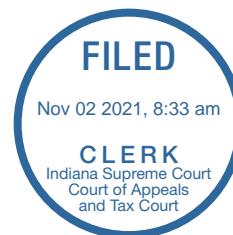


MEMORANDUM DECISION

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 re the Adoption of
M.D.W.:
M.W.,
Appellant,

v.

R.C.,
Appellee,

November 2, 2021

Court of Appeals Case No.
21A-AD-450

Appeal from the Tippecanoe
Circuit Court

The Honorable Sean M. Persin,
Judge

Trial Court Cause No.
79C01-1603-AD-16

Robb, Judge.

Case Summary and Issues

- [1] The juvenile court granted a petition by R.C., maternal grandfather of M.D.W. (“Child”), to adopt Child, finding that the consent of M.W., Child’s biological father, was not required. M.W. appeals the juvenile court’s order granting the petition for adoption, raising two issues for our review, which we restate as: (1) whether the juvenile court erred by finding that M.W.’s consent was not required; and (2) whether the juvenile court erred by failing to issue findings that the adoption was in Child’s best interest. Concluding that M.W.’s consent is not required but that the juvenile court erred by failing to issue findings regarding Child’s best interest, we affirm in part and reverse and remand in part.

Facts and Procedural History

- [2] M.W. and C.C. are the biological parents of Child. R.C. testified that from the time Child was born on May 8, 2013, until the end of 2014, C.C. and Child lived with him. R.C. also testified that during that time, M.W. never visited Child or provided monetary support. M.W. testified that Child lived with him from birth until he and C.C. split up; however, M.W. did not provide a specific time for their breakup. In 2015, C.C. and Child were living at a woman’s shelter in Danville, Illinois. In January 2016, C.C. passed away and Child lived with a paternal aunt for a brief period before moving back in with R.C. Between February 2016 and April 2016, M.W. was in prison.

- [3] On March 29, 2016, R.C. filed a Verified Petition for Adoption.¹ R.C. claimed that M.W.’s consent was not required “because he [had] abandoned, failed to support, or failed to communicate with the minor child.” Appellant’s Appendix, Volume II at 19.
- [4] M.W. filed a notice to contest the adoption. Subsequently, R.C. was granted temporary custody of Child and M.W. was granted parenting time every other weekend. On October 22, 2016, M.W. was exercising parenting time when he was arrested, and R.C. had to pick up Child from an unfamiliar address. M.W. was incarcerated until February 2017.
- [5] On February 4, 2020, the juvenile court held a hearing to determine whether M.W.’s consent to the adoption was required. Because M.W. was incarcerated at the time, he participated telephonically. At the hearing, M.W. testified that between May 2016 and October 2016 he reached out to R.C. through phone calls and Facebook messages in an attempt to contact Child. M.W. also attempted to see Child in person at a park in June 2018 but Child had no idea who M.W. was. *See* Transcript (Hearing on February 4, 2020), Volume 2 at 14-15.
- [6] The juvenile court issued an Order Finding Father’s Consent Not Required, finding in relevant part:

¹ R.C.’s wife was initially also a petitioner; however, she passed away on April 23, 2019.

4. Paternity of [Child] was established by paternity affidavit, and this Court is unaware of any pending paternity cases.

* * *

16. In May 2016, [Child] started residing with [R.C.].

* * *

20. [M.W.] has contacted [R.C.] once since [he was released from jail in January or February 2017], on June 8, 2018, when [M.W.] showed up at a ballpark, and [Child] didn't recognize him.

* * *

25. At all times since May 2016, [M.W.] knew that [Child] was living with [R.C.].

26. [Child] is now seven (7) years old and he has not had any meaningful contact with [M.W.] since he was two (2) years old.

27. For a period of at least one year, [M.W.] has failed to communicate with [Child] when able to do so, without justifiable cause.

28. For a period of at least one year, [M.W.] has failed to contribute anything towards the care and support of [Child] when able to so.

29. Pursuant to [Ind. Code §] 31-29-9-8[(a)](2)(A) and (B), [M.W.'s] consent is *not* required for [Child] to proceed in this case.

Appellant's App., Vol. II at 78-80.

- [7] On November 20, 2020, a final hearing on the adoption was held. The juvenile court issued a Decree of Adoption granting R.C.'s petition to adopt Child on February 16, 2021. M.W. now appeals.

Discussion and Decision

I. Standard of Review

- [8] In decisions relating to adoptions, we will presume the juvenile court's decision is correct and will not disturb the court's ruling unless the evidence leads to only one conclusion and the juvenile court reached the opposite conclusion. *In re Adoption of T.L.*, 4 N.E.3d 658, 662 (Ind. 2014). We will not reweigh the evidence. *In re Adoption of J.T.A.*, 988 N.E.2d 1250, 1252 (Ind. Ct. App. 2013), *trans. denied*. Rather, we will examine the evidence most favorable to the juvenile court's decision, together with reasonable inferences drawn therefrom, to determine whether sufficient evidence exists to sustain the decision. *Id.* A petitioner for adoption without parental consent has the burden of proof to establish, by clear and convincing evidence, one of the statutory criteria for dispensing with consent. *In re Adoption of M.A.S.*, 815 N.E.2d 216, 220 (Ind. Ct. App. 2004). Questions of law are reserved for the court and reviewed *de novo*. *In re Adoption K.G.B.*, 18 N.E.3d 292, 296 (Ind. Ct. App. 2014).

II. Consent

[9] M.W. argues the juvenile court erred in determining his consent was not required. There are several grounds for concluding that a parent's consent to adoption is not required. *See* Ind. Code § 31-19-9-8. The juvenile court determined that M.W.'s consent was not required pursuant to Indiana Code section 31-19-9-8(a)(2), which provides consent is not required when

[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.

[10] M.W. contends that the juvenile court erred by concluding he failed to communicate significantly with Child when able to do so. The party petitioning for adoption without parental consent has the burden of proving both that a lack of communication occurred for a period of one year and that the ability for communication during that period existed. *Rust v. Lawson*, 714 N.E.2d 769, 772 (Ind. Ct. App. 1999), *trans. denied*. In *Rust*, we stated:

In order to preserve the consent requirement for adoption, the level of communication with the child must not only be significant, but it also must be *more than* 'token efforts' on the part of the parent to communicate with the child. Ind. Code § 31-19-9-8(b). The reasonable intent of the statute is to encourage non-custodial parents to maintain communication with their children

and to discourage non-custodial parents from visiting their children just often enough to thwart the adoptive parents' efforts to provide a settled environment for the children.

Id. (emphasis added).

[11] Although M.W. testified that Child lived with him from birth until he and C.C. split up, he does not provide a specific time for the breakup. In 2015, C.C. and Child were living at a woman's shelter in Danville, Illinois. In January 2016, C.C. passed away and Child lived with a paternal aunt for a brief period before moving back in with R.C. After C.C.'s death in 2016, Child began living with R.C. and R.C. filed a Verified Petition for Adoption in March 2016. After Child began living with R.C., M.W. was granted visitation. However, the last of M.W.'s parenting weekends was the weekend of October 22, 2016, when M.W. was arrested and sent to jail and R.C. was required to pick Child up from an unfamiliar address.²

[12] M.W. claims R.C. thwarted and hampered his attempts to communicate with Child. M.W. testified that between May 2016 and October 2016 he attempted to contact Child through phone calls and Facebook messages to R.C. but never

² M.W. also argues that the juvenile court erred because it found M.W. failed to communicate due to his incarceration. First, we do not believe that the juvenile court's inclusion of the time M.W. spent in jail meant it relied solely on his incarceration to conclude M.W. failed to communicate. Second, the consideration of a parent's incarceration when determining whether they significantly communicated with the child is not impermissible. *See Lewis v. Roberts*, 495 N.E.2d 810, 813 (Ind. Ct. App. 1986) (stating "confinement alone [does not] constitute justifiable reason for failing to maintain significant communication with one's child. Incarceration, however, unquestionably alters the means for significant communication.") (internal citation omitted).

received an answer. He also made a physical effort to find Child at the ballpark in 2018. Efforts of a custodial parent to hamper or thwart communication between parent and child are relevant in determining the ability to communicate. *Rust*, 714 N.E.2d at 772. However, we note that all communication attempts M.W. argues were thwarted occurred after the petition for adoption had been filed.³ The record is devoid of other examples of contacts or communication between M.W. and Child.

[13] We conclude the juvenile court did not err in determining that there was a period of one year in which M.W. did not have significant communication with Child. *See Lucas v. Nunn*, 435 N.E.2d 624, 626 (Ind. Ct. App. 1982) (“It is not necessary that the period of non-communication be the year immediately prior to the filing of an adoption-termination petition.”). Under Indiana Code section 31-19-9-8(a)(2), parental consent is not required when either of the two criteria is met, thus we need not address M.W.’s argument that the evidence was insufficient to show he knowingly failed to provide care and support for Child.⁴

³ A parent’s “conduct after the filing of the petition is wholly irrelevant to the determination of whether the parent failed to significantly communicate with the child for any one year period.” *See Lower v. Subzda*, 562 N.E.2d 745, 750 n.3. (Ind. Ct. App. 1990).

⁴ M.W. argues that because he was not legally required to pay child support, the juvenile court erred in finding he failed to provide care and support to Child. However, this court has held that even in the absence of a child support order there is a common law duty to support one’s child. *See Irvin v. Hood*, 712 N.E.2d 1012, 1014 (Ind. Ct. App. 1999) (stating a father’s “failure to provide support for a child whom he acknowledged as his own establishes that he has failed to support his child ‘as required by law or judicial decree.’”) (emphasis omitted).

III. Best Interest of Child

[14] M.W. argues the juvenile court failed to make findings of fact and conclusions of law regarding the best interest of Child in the Decree of Adoption.⁵ See Brief of Appellant at 9. Under Indiana Code section 31-19-11-1:

(a) Whenever the court has heard the evidence *and finds that*:

(1) the adoption requested is in the best interest of the child;

* * *

the court shall grant the petition for adoption and enter an adoption decree.

(Emphasis added.)

[15] Here, after the juvenile court issued an order finding M.W.'s consent was not required, it held a hearing to determine "whether or not [the] adoption serves the best interest of the child." Transcript (Hearing on November 20, 2020), Volume 2 at 4. The record of the hearing is clear that the juvenile court believes that adoption is in the best interest of Child, and in the Decree of Adoption, the

⁵ Conversely, R.C. argues that the juvenile court was not required to make specific findings because neither party requested them pursuant to Indiana Trial Rule 52(A). However, Trial Rule 52(A)(3) states that the court shall make special findings of fact without request "in any other case provided by these rules or by statute." Therefore, because Indiana's adoption statute requires findings regarding the best interest of the child, Trial Rule 52 requires the juvenile court to make findings without request. *Cf. Hegerfeld v. Hegerfeld*, 555 N.E.2d 853, 856 (Ind. Ct. App. 1990) (holding that custody statute requiring trial court to "determine custody and enter a custody order in accordance with the best interests of the child" did "not require the trial court to make specific findings unless specific findings are requested pursuant to Trial Rule 52(A)").

juvenile court concluded that “the adoption prayed for is in the best interest” of Child. Appealed Order at 1. However, the juvenile court failed to issue findings supporting its conclusion regarding the best interest of Child as required by Indiana Code section 31-19-11-1(a)(1). We believe that a judgment terminating the relationship between a parent and child is impossible to review on appeal if it is nothing more than a mere recitation of the conclusions the governing statute requires the trial court to reach. *In re A.K.*, 924 N.E.2d 212, 220 (Ind. Ct. App. 2010), *trans. dismissed*. Therefore, we remand for findings that address the proper statutory considerations. On remand, the juvenile court need not conduct another hearing, but it must issue a new Decree of Adoption within thirty days of the date of this opinion that includes findings regarding the best interest of Child.

Conclusion

[16] We conclude that M.W.’s consent is not required but that the juvenile court erred by failing to issue findings regarding Child’s best interest. Accordingly, we affirm in part and reverse and remand in part with instructions for the juvenile court to enter proper findings of fact and conclusions of law regarding the best interests of Child.

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

Bradford, C.J., and Altice, J., concur.