

MEMORANDUM DECISION

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ATTORNEY FOR APPELLANT

John Ryan Worman
Evansville, Indiana

ATTORNEY FOR APPELLEE

Andrew C. Carroll
Law Office of Steven Deig
Evansville, Indiana

IN THE COURT OF APPEALS OF INDIANA

In Re: The Adoption of:
H.B. (Child)
M.B. (Father),
Appellant-Respondent,

v.

S.B.,
Appellee-Petitioner.

December 28, 2022

Court of Appeals Case No.
22A-AD-1483

Appeal from the Vanderburgh
Superior Court

The Honorable Renee A.
Ferguson, Magistrate

Trial Court Cause No.
82D04-2107-AD-96

Riley, Judge.

STATEMENT OF THE CASE

- [1] Appellant-Respondent, M.B. (Father), the biological father to H.B. (Child), appeals the trial court's Order granting the petition for adoption of Child by Appellee-Petitioner, S.B. (Adoptive Father).
- [2] We affirm.

ISSUES

- [3] Father presents two issues on appeal, which we restate as the following:
- (1) Whether the trial court erred when it concluded that Father's consent was not required for the adoption of Child; and
 - (2) Whether the trial court erred when it concluded that adoption was in the best interests of Child.

FACTS AND PROCEDURAL HISTORY

- [4] In 2006, Father pleaded guilty to Class D felony theft and was sentenced to two years in the Department of Correction (DOC), with the first six months to be served on work release and the balance suspended to probation. Child was born on January 23, 2007, during the marriage of Father and T.B. (Mother). When Child was six months old, Father violated his probation and was ordered to serve the balance of his sentence in the DOC.
- [5] Mother and Father divorced on June 18, 2008. The trial court ordered joint legal custody, Mother was granted sole physical custody of Child, and Father

was ordered to pay weekly child support of thirty-one dollars. Mother's address at the time of the divorce was 1300 East Illinois Street, Evansville, Indiana. Following his release from the DOC, Father exercised parenting time every other weekend in accordance with the Indiana Parenting Time Guidelines. Mother married Adoptive Father in 2010.

[6] Between February 2 and February 22, 2016, Father was charged with two Counts of Level 3 felony dealing in methamphetamine, and one Count of Level 5 felony dealing in methamphetamine. Mother then moved to have Father's parenting time supervised. The trial court ordered Father's parenting time to be managed through the Parenting Time Center (PTC). But because Father did not pay the parenting time fees to PTC, his visitations were terminated.

[7] In May 2016, Father was arrested for several dealing charges. Pursuant to a plea agreement, Father pleaded guilty to Level 5 felony dealing in methamphetamine, and the State dismissed the remaining Counts. Father was sentenced to serve three years in the DOC. In October 2017, the trial court ordered the remainder of Father's sentence suspended to probation. As a special condition of probation, Father was directed to complete a drug treatment program. A petition to revoke Father's probation was filed on January 16, 2018. Following a hearing, the trial court ordered Father to serve the balance of his sentence in the DOC. On January 11, 2019, the State once again filed an Information, charging Father with Level 2 felony dealing in methamphetamine, Level 3, 4, and 5 felony possession of methamphetamine, and a habitual offender charge. Pursuant to a plea agreement, Father pleaded

guilty to Level 5 felony possession of methamphetamine, and the State dismissed all other Counts. Father was sentenced to five years in the DOC.

[8] On July 9, 2021, Adoptive Father petitioned the trial court for the adoption of Child. Adoptive Father claimed that for more than one year, Father had failed to provide care and support to Child, and that Father had failed, without justifiable cause, to significantly communicate with Child from December 2016 until April 2021 and had, therefore, abandoned Child. Mother consented to the adoption, and Child, who was fourteen years old at the time, agreed to the adoption. Father timely filed his objection on July 27, 2021. A consent hearing was held on December 7, 2021, and March 30, 2022. Mother and Adoptive Father both testified that the last time Father saw Child, she was nine years old. Child testified that she could not recall the last time she saw Father but recalled spending time with him when she was younger.

[9] Father claimed that while he was out on probation in 2018, he contacted Mother via Facebook messenger about seeing Child, but that Mother did not respond to his message. He also claimed that between 2017 and 2022, he had written letters to Child and had given them to his mother (Paternal Grandmother). Paternal Grandmother, in turn, testified that she did not see Child during that time and so she failed to give the letters to Child. Despite Mother and Child living at the same address for the past fourteen years since Child was born, Father claimed that Mother had not advised him of her home address or phone number. Yet, beginning April 2021 through 2022, Father wrote letters to Child every two weeks. Mother admitted that she received

those letters, had handed them to Child, and had given Child the option of writing back to Father. Father also claimed that he was current with his child support payments.

[10] The trial court took the matter under advisement and allowed the parties to tender their proposed findings of fact and conclusions of law. On May 26, 2022, the trial court issued an Order, stating, in pertinent part, that

9. At the December 7, 2021[,] hearing, the [c]ourt heard the testimony of [] [C]hild who stated she did not want contact with [] [F]ather.

10. [] [C]hild testified that she had not had any contact with Father-until Mother gave her the letters written to her by Father in April 2021.

11. [] [C]hild further testified that she wanted no contact or any relationship with [] Father.

12. [] [C]hild stated that she considered [Adoptive Father] her father and calls him “dad”.

13. [C]hild testified that [Adoptive Father] has been the one to support her for most of her life.

14. Mother and [Adoptive Father] testified they were the ones who paid expenses for [] [C]hild’s school, clothing, extracurriculars, medical expenses, and all other expenses.

15. [Adoptive Father] submitted certified [c]ourt records showing Father has a substantial criminal history, including convictions for [d]ealing in [m]ethamphetamine, a Level 5 [f]elony in [C]ause

26601-1603-F3-000304 and [p]ossession of [m]ethamphetamine, a Level 5 [f]elony in cause 82001-1901-F2-000371.

16. Paternal Grandmother testified that Father has had issues with substance abuse “since he was a teenager.”

17. Father has been consistently incarcerated since 2018 due to felony criminal offenses.

18. Father testified that he had no knowledge of [Child’s] residence until April 2021.

19. In rebuttal, Mother testified that she has not changed addresses since the last time Father was out of custody and that he knew where they lived.

20. The [c]ourt finds Mother’s testimony more credible than Father’s.

21. Mother submitted certified [c]ourt records from the parties’ [] listing her address as 1300 E. Illinois Street[,] Evansville, IN 47711.

22. [Adoptive Father’s] address listed for this cause is 1300 E. Illinois Street[,] Evansville, IN 47711.

23. Exhibit #1 shows Father was ordered to pay thirty-one dollars (\$31.00) per week in support on June 18, 2008.

24. Also, in Exhibit #1, on September 30, 2015, the State of Indiana filed a Motion for Rule to Show Cause due to Father’s failure to pay support.

25. On November 13, 2015, Father failed to appear for the show cause hearing and the [c]ourt issued a writ of attachment for Father. At the same hearing, Father's arrearage was determined to be \$648.11.

26. Exhibit #1 shows that Mother filed a Petition to Modify Father's parenting time on February 24, 2015.

27. The [c]ourt set a hearing on Mother's Petition to Modify Parenting Time for March 4, 2016, at which time Father failed to appear.

28. Upon cross examination by [Adoptive Father's] counsel as to whether he filed any request to exercise parenting time with the child in [c]ourt, Father alleged he was indigent and that he could not afford the fees associated with exercising supervised parenting time.

29. Father testified that he was last out of custody in 2016 but was not able to consistently visit with [] [C]hild due to his inability to pay the fees related to his supervised parenting time.

30. [Adoptive Father's] Exhibit #1 shows that Father neither filed any pleadings or requests for parenting time with [] [C]hild during the time when he was not incarcerated, nor did he file any pleadings alleging that he was indigent at that time or otherwise unable to afford the fees associated with the supervised visits.

31. The [c]ourt finds that Father also failed to file any other pleadings, motions, or other requests seeking relief from the [c]ourt alleging he had no knowledge of [] [C]hild's residence.

32. Particularly of note in this matter, the [c]ourt finds Father's sister is permitted to have as much contact with [] [C]hild as she likes, even having [] [C]hild stay overnight on occasion.

33. The [c]ourt finds that had Father wished to communicate with [] [C]hild in any significant way during the past six (6) years, he had every opportunity to do so and simply made no effort.

34. Father testified he was incarcerated again following his release, but his sentence was revoked due to a "technical violation."

35. The [c]ourt finds that, pursuant to Father's own testimony, the "technical violation" was, in reality, the commission of a new felony drug offense just a few months after he was released from incarceration.

36. Father agreed that he had been consistently incarcerated since 2016, but stated he had been a part of [] [C]hild's life "until she was nine (9) years old."

37. [] [C]hild is now fifteen years old (15) and, despite [] [C]hild living at the same address since 2016, Father made no consistent efforts to communicate with [] [C]hild for a period of more than one (1) year.

38. The [c]ourt does not find Father's allegations that he did not have a valid address for [] [C]hild credible based on the evidence presented showing Mother has resided at the same address since 2016.

Conclusions of Law

* * * *

41. The [c]ourt finds and concludes that [Adoptive Father] need only prove one (1) of the statutory elements necessary to dispense with Father's consent

42. Father's efforts to communicate with [] [C]hild after the Petition to Adopt was filed are irrelevant to these proceedings. . . .

43. The [c]ourt finds and concludes that [Adoptive Father] has met his burden and that Father's consent is not necessary for the [c]ourt to approve the adoption.

44. The [c]ourt finds and concludes that [Adoptive Father's] incarceration is not a justifiable reason for his failure to communicate with [] [C]hild for more than one (1) years. . . .

45. The [c]ourt finds and concludes that [Adoptive Father] has further met their burden in establishing that Father has failed without justification to communicate significantly with [] [C]hild for a period of more than one (1) year.

46. The [c]ourt finds and concludes that [Adoptive Father] has further met their burden in establishing, by clear and convincing evidence, that Father is unfit to be a parent due to his significant criminal history, lifelong struggles with substance abuse, and constant incarceration.

47. The [c]ourt further notes that, while Father's child support obligation was current at the date of the hearing, the child support payment history submitted to the [c]ourt shows significant gaps in between payments.

48. The [c]ourt also notes that on at least one occasion, the [c]ourt was required to issue a writ of attachment to compel Father's payment of support.

49. The [c]ourt finds and, concludes that Father is unfit to be a parent and that the best interests of [] [C]hild are served by dispensing with Father's consent and granting [Adoptive Father's] request to adopt [] [C]hild.

(Appellant's App. Vol. II, pp. 104-109). The trial court also issued an order finding that the adoption of Child by Adoptive Father was in Child's best interests.

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

DISCUSSION AND DECISION

A. *Standard of Review*

[12] Father is appealing from a decision in which the trial court entered findings of fact and conclusions thereon pursuant to Indiana Trial Rule 52(A).¹ When a trial court enters findings of fact and conclusions thereon pursuant to Ind. Trial Rule 52(A) as it did here, we employ a two-tiered standard of review: (1) we determine whether the evidence supports the findings of fact and (2) whether the findings support the judgment. *In re Adoption of H.N.P.G.*, 878 N.E.2d 900, 903-04 (Ind. Ct. App. 2008), *trans. denied*. "We will not reweigh the evidence but instead will examine the evidence most favorable to the trial court's

¹ It appears from the record that neither party requested that findings be entered by the trial court.

decision together with reasonable inferences drawn therefrom to determine whether sufficient evidence exists to sustain the decision.” *In re Adoption of M.A.S.*, 815 N.E.2d 216, 218-19 (Ind. Ct. App. 2004) (citation omitted). The trial court’s decision is presumed to be correct, and it is the appellant’s burden to overcome that presumption. *Id.*

I. *Consent*

[13] Parental consent is generally required to adopt a child in Indiana. *In re Adoption of S.W.*, 979 N.E.2d 633, 639 (Ind. Ct. App. 2012). But Indiana Code section 31-19-9-8(a) provides in part, that

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

* * * * *

(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.

* * * * *

(11) A parent if:

(A) a petitioner for adoption proves by clear and convincing evidence that the parent is unfit to be a parent; and

(B) the best interests of the child sought to be adopted would be served if the court dispensed with the parent's consent.

* * * * *

(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.

“The burden to prove th[ese] statutory criteri[a] . . . by clear and convincing evidence rests squarely upon the petitioner seeking to adopt.” *In re Adoption of T.L.*, 4 N.E.3d 658, 662 n.3 (Ind. 2014). Here, the trial court dispensed with Father’s consent due to his: (1) failure to communicate significantly with the Child without justifiable cause for a period of at least one year; (2) failure to support Child and (3) unfitness to parent.²

[14] As Father sees it, the trial court’s findings do not consider his reasonable attempts to see Child. Despite being incarcerated since 2016, he maintains that he tried to see Child in 2018 while he was out of the DOC, and he texted

² Indiana Code section 31-19-9-8(a) is written in the disjunctive form such that the existence of any of these circumstances suffices to dispense with consent. *In re Adoption of D.C.*, 928 N.E.2d 602, 606 (Ind. Ct. App. 2010) (citation omitted), *trans. denied*. As we will explain below, the trial court properly relied on at least one statutory provision, that Father failed to communicate significantly with Child, although he could do so. Therefore, we will not address the trial court’s other findings that Father was unfit or failed to support Child.

Mother on Facebook messenger expressing his desire to see Child. He also claims that his failure to communicate with Child after 2018, was because he was oblivious of Mother's and Child's address, and that it was not until 2021, that he learned of their address and began regular communication with Child by writing to her every two weeks between April 2021 and April 2022.

[15] Father's contentions amount to a request that we reweigh the evidence, which we cannot do. *See In re Adoption of M.A.S.*, 815 N.E.2d at 218-19. We find that Father's latest attempt to communicate with Child was unimportant in the context of Indiana Code section 31-19-9-8. The "period of at least one (1) year" described in Indiana Code section 31-19-9-8(a)(2) refers to any year not just the year before the adoption petition. *See In re Adoption of J.T.A.*, 988 N.E.2d 1250, 1255 (Ind. Ct. App. 2013). Further, our courts have recognized that a determination on the significance of the communication is not one that can be mathematically calculated to precision. *Matter of Adoption of I.B.*, 163 N.E.3d 270, 276 (Ind. 2021). On one hand, a single significant communication within one year is enough to preserve a non-custodial parent's right to consent to the adoption. *Id.* On the other hand, multiple, and consistent contacts may not be found to be significant in context. *Id.*

[16] The evidence most favorable to the trial court's decision reveals that in the five years before the filing of the adoption petition, Father did not see or speak with Child. Although Father was incarcerated for much of this time, was out briefly for four months in 2018 and remains incarcerated today, there was nothing that prevented him at the start of his incarceration from sending letters to Child

given that Father was aware of Mother's residence, a fact supported by court documents pertaining to Child. *See Lewis v. Roberts*, 495 N.E.2d 810, 813 (Ind. Ct. App. 1986) (where we held that an incarcerated father had communicated significantly with his daughter where he had written her weekly and seen her every other week during the first nine months of his imprisonment and where he wrote her two to three times a year and sent cards and gifts at Christmas, at Easter, and on her birthday, for four years even though she and her custodian answered none of his letters.)

[17] In relation to Father's claims that Mother was hindering his attempts to communicate with Child, that he had contacted her on Facebook messenger in 2018 but that she ignored his message, the trial court disregarded Father's testimony and concluded that Father's first attempt to communicate with Child after five years was in April 2021. Mother stated that she gave Child each letter Father wrote to Child, that she gave Child the option to reply, but Child declined. As our supreme court held in *I.B.*, 163 N.E.3d at 276, multiple, and consistent contacts may not be found to be significant in given context. Here, we cannot say that the trial court erred by disregarding Father's latest letters to Child as token attempts at communication, thus supporting a decision to dispense with his consent to the adoption. *See In re Adoption of S.W.*, 979 N.E.2d 633, 641 (Ind. Ct. App. 2012) (father's consent for child's adoption not required based on father's failure without justifiable cause to communicate significantly with child during relevant time frame). Based on the foregoing, we conclude that the trial court did not err in concluding that Father failed to

communicate with Child without justifiable cause for a period of one year, and therefore his consent to the adoption was not required.

II. *Best Interests*

[18] Father argues that Child's adoption by Adoptive Father was not in Child's best interests. The primary concern in every adoption proceeding is the best interests of the child. *In re Adoption of M.S.*, 10 N.E.3d 1272, 1281 (Ind. Ct. App. 2014). There is no guidance in the adoption statute for what factors to consider when determining the best interests of a child, but the adoption statute and termination of parental rights statute have many similarities in this regard. *Id.* We have held that, when determining whether a child's best interests are served, the trial court must consider the totality of the evidence. *Id.* Factors to consider include the bond between parent and child, whether the relationship between parent and child included abuse or neglect by the parent, the parent's history of criminal activity, and the child's need for permanency. *In re: K.T.K.*, 989 N.E.2d 1225, 1235 (Ind. 2013).

[19] Throughout Child's life, Father has struggled with drug addiction, has failed to complete drug treatment when ordered to do so, has violated his probation several times, and has been imprisoned due to drug dealing or drug possession charges. The record also shows that Father was homeless or lived in homeless shelters when he was not incarcerated. As to whether Father could provide for Child's necessities, the record shows that Adoptive Father and Mother paid all of Child's expenses and supported Child while Father was in and out of the DOC. In addition, Child's testimony revealed that she did not want a

relationship with Father, and it was clear from her testimony that she was well bonded with Adoptive Father and that she regarded him as her father.

[20] In light of the above factors, we conclude that the trial court did not err in determining that adoption was in Child's best interests.

CONCLUSION

[21] Based on the above, we hold that the trial court did not error in finding that Father's consent was unnecessary for the adoption of Child. We also conclude that the evidence supports the trial court's conclusion that adoption is in Child's best interests.

[22] Affirmed.

[23] Bailey, J. and Vaidik, J. concur