

MEMORANDUM DECISION

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IN THE COURT OF APPEALS OF INDIANA

In the Matter of the Adoption of
K.S.;
W.G.,
Appellant-Petitioner,

v.

J.S.,
Appellee-Respondent.

September 14, 2021

Court of Appeals Case No.
21A-AD-461

Appeal from the Jasper Circuit
Court

The Honorable John D. Potter,
Judge

Trial Court Cause No.
37C01-1908-AD-11

Najam, Judge.

Statement of the Case

[1] W.G. (“Stepfather”) appeals the trial court’s order dismissing his petition to adopt J.S.’s (“Father’s”) minor child, K.S. (“Child”). Stepfather raises one

issue for our review, namely, whether the trial court erred when it granted Father's motion to contest the adoption and dismissed Stepfather's petition.

[2] We affirm.

Facts and Procedural History

[3] C.G. ("Mother") gave birth to Child on July 12, 2010, and Father, who was not married to Mother, established his paternity. Shortly thereafter, the court ordered Father to pay \$75 per week in child support. Father made regular payments to Mother until 2017, when Father sustained a serious injury and was no longer able to work. Also in 2017, Mother married Stepfather. In 2018, Father only made one child support payment in the amount of \$61.00. As a result of his failure to make payments, Father's driver's license was suspended.

[4] Between 2014 and 2019, Father did not request to see Child. However, during that time, Mother took Child to visit Father's parents "every few months[.]" Tr. at 32. And Mother learned "after the fact" that Father was seeing Child during those visits. *Id.* at 33. Then, in July 2019, Father contacted Mother directly about visiting Child.

[5] On August 12, with Mother's consent, Stepfather filed a petition to adopt Child. In that petition, Stepfather alleged that Father's consent was not required because "he has had no regular, substantial or consistent contact" with

Child and because he has not “paid support for the child[.]” Appellant’s App. Vol. 2 at 8.¹ Father filed a motion to contest the adoption.

[6] In December, Father began seeing Child pursuant to a court order “issued to phase in contact” between Father and Child. Tr. at 33. Once that order was in effect, Father saw Child “regularly.” *Id.* In the meantime, Father continued to miss child support payments. After his payment in 2018, Father did not make another payment until May 2020, when he received a COVID stimulus check that was garnished. Following that payment, Father’s license was reinstated.

[7] On March 4 and November 24, 2020, the court held a fact-finding hearing on Father’s motion to contest the adoption. On the second day of the hearing, Mother testified that Father had made payments up to 2017 but that he only made one payment in 2018 and then one payment in May 2020. Mother also testified that Father resumed making payments in October. And Mother acknowledged that Father continued to make child support payments as of the hearing.

[8] Father’s mother testified that, when Child would visit her house, Father would come over and visit with Child. In addition, Father’s sister testified that between August 2018 and August 2019, Child visited Father’s mother’s house “five or six times” and that, of those times, Father “miss[ed] one or two

¹ Stepfather also briefly asserted that Father’s consent was not necessary because Father had abandoned Child. The trial court found that Father had not abandoned Child, and Stepfather does not challenge that determination on appeal.

maybe.” *Id.* at 80. She further testified that, when Father would visit Child at his mother’s house, he would stay for “[a]n hour or two.” *Id.* at 80.

[9] Finally, Father testified that he had to stop working in the winter of 2017 because of an injury and, as a result, has filed a request for disability with the Social Security Administration. He also stated that he is not “physically able” to be employed. *Id.* at 85. But he testified that, since his license was reinstated in October 2020, he was able to make some money by babysitting his sister’s children and by helping his grandfather, which money he used to make child support payments. Father also testified that, between 2014 and 2018, he saw Child at his mother’s house “two, three times a year, maybe four.” *Id.* at 88. And he testified that, while he never got Child any birthday cards between 2014 and 2019, he bought her Christmas presents.

[10] Following the hearing, the court found and concluded in relevant part as follows:

[Father] has significantly communicated with [Child] for the immediate one year after the petition was filed when the family law Court granted him specific visitation. Prior to that instance, [Father’s] contact was inconsistent with [Child]. [Father] and [Mother] did not have a good relationship; however, [Mother] maintained a relationship with [Father’s] family, including his mother whom [Mother] allowed regular visitation at her house. This occurred for the five years preceding the filing of the Petition for Adoption. [Father] would see [Child] during those visitations at his [m]other’s house. He even lived in that house for part of that time period. [Father] had contact with [Child] through his mother’s visitations despite [Mother] tying that visitation right to a promise that [Father] would not have the

[C]hild with him. [Father] visited [Child] at his mother's home after [Mother] left the [C]hild and before she comes to pick up the [C]hild. [Mother's] testimony that [Father] was not there is not convincing when [Father's] [m]other and [s]ister who were there described how the visitation with [Father] happened to keep [Mother] unaware of [Father's] visits which she tried to block. . . .

The evidence shows that [Father] ha[d] requested visitation from [M]other one month prior to the filing of the adoption petition and [Mother] admitted that [Father] visited with his child within one year of the filing of the Petition for Adoption. Indiana law has held that even a single instance of significant communication is enough to overcome the provision of Ind. Code § 31-19-9-8 obviating the need for consent. [Father] has had a relationship with [Child] prior to the filing of the Petition and had meaningful contact with the [C]hild despite barriers placed by [Mother] to hinder his visitations. Moreover, the past year of visitation since the Petition shows that [a] bond between [Father] and [Child] existed and was strengthened by regular, court mandated contact. Father has not failed to significantly communicate with [Child], and his consent to the adoption is not obviated by statute because of [the] lack of meaningful contact.

The Petitioner, [Stepfather], argues that [Father's] consent is not necessary because he failed to provide care and support for the [C]hild when able to do so per Ind. Code § 31-19-9-8(a)(2)(B) for a period of one year. Father paid support regularly as recently as 2017. In 2018, [Father] made one payment of \$61.00 and in 2020 [Father] paid over \$1300.00 in support. There is no record of payment or evidence of payment in 2019. The evidence shows that [Father] was regularly employed until 2017 but suffered serious back and shoulder issues which required multiple surgeries. [Father] had surgeries on his spine and shoulder in 2017, 2018 and 2019 and has been unable to work during that time. He has a disability claim pending. The money he earned

to pay any support was from babysitting children of family members or from helping his grandfather. His driver's license was administratively suspended by the IV-D office in 2017 which also added to his employment difficulties.

Because [F]ather is paying some support during 2020 from his babysitting monies, it appears that [F]ather could have paid more support in 2018 and 2019 than he did. However, [F]ather's evidence of his injuries was undisputed and he has a pending disability claim. It is hard for the Court to conclude that he failed to support [Child] "*when able to do so*" as the statute reads. Even if the Court did find that [F]ather's consent was not necessary because of support, Ind. Code § 31-19-10-6 is still fatal to [Stepfather's] petition. That statute requires in a contested adoption that the Court "dismiss the petition for adoption if the court . . . finds that it is in the best interests of the child that the motion to contest the adoption be granted."

In this cause, there is significant evidence that severing [Child's] relationship with [Father] and his family would be contrary to her best interests. Despite [M]other's claims that those relationships would continue, the Court cannot legally rely on her unenforceable promise. [Child] has had a relationship with her paternal grandmother and paternal relatives for years. As set out herein, [Child] has a relationship with her father which is strong and thriving since November of 2019. Severing that relationship and the extended family relationships would be detrimental to [Child]. . . .

Appellant's App. Vol. 2 at 30-32 (emphasis in original). Accordingly, the court granted Father's motion to contest and dismissed Stepfather's adoption petition. This appeal ensued.

Discussion and Decision

[11] Stepfather contends that the trial court erred when it granted Father's motion to contest the adoption and dismissed Stepfather's petition. As our Supreme Court has stated:

In family law matters, we generally give considerable deference to the trial court's decision 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.

Accordingly, 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.

J.W. v. D.F. (In re Adoption of E.B.F.), 93 N.E.3d 759, 762 (Ind. 2018) (quotation marks and citations omitted). We will not disturb the trial court's decision in an adoption proceeding unless the evidence at trial leads to but one conclusion and the trial court reached the opposite conclusion. *R.K.H. v. Morgan Cnty. Off. of Fam. and Child. (In re Adoption of M.W.)*, 845 N.E.2d 229, 238 (Ind. Ct. App. 2006). We will neither reweigh the evidence nor assess the credibility of witnesses, and we will examine only the evidence most favorable to the trial court's decision. *Id.*

[12] Here, the trial court granted Father's motion to contest the adoption and dismissed Stepfather's petition pursuant to Indiana Code Section 31-19-10-6 (2021). That statute provides that the court:

(2) shall, after hearing evidence at the hearing:

(A) dismiss the petition for adoption if the court:

(i) finds that the person who filed the motion to contest the adoption has established that it is in the best interests of the child that the motion to contest the adoption be granted;

(ii) finds that a required consent to the adoption has not been obtained in writing or has not been implied under IC 31-19-9; or

(iii) permits a necessary consent to the adoption to be withdrawn.

Ind. Code § 31-19-10-6. The court dismissed Stepfather's petition for adoption pursuant to subsections (2)(i) and 2(ii). On appeal, Stepfather contends that the court erred when it concluded both that it was in Child's best interests that Father's motion to contest be granted and that Father's consent was required but not obtained. However, as Indiana Code Section 31-19-10-6(2) is written in the disjunctive, we need not address Stepfather's argument that the court erred when it concluded that it was in Child's best interests that Father's motion to contest be granted.² Rather, we only need to consider whether the court erred when it concluded that Father's consent to the adoption was required.³

² While we need not address whether it was in Child's best interest for the court to grant Father's motion to contest the adoption, we note that there is sufficient evidence for the trial court to have determined that it was in Child's best interest for Father's motion to be granted.

³ There is no dispute that Father's consent was not obtained.

[13] Indiana law generally requires natural parents to consent to adoptions. Ind. Code § 31-19-9-1. However, a natural parent’s consent to an adoption is not required if the trial court finds by clear and convincing evidence that a parent “fails without justifiable cause to communicate significantly with the child when able to do so” or “knowingly fails to provide for the care and support of the child when able to do so as required by law or judicial decree.” I.C. § 31-19-9-8(a)(2). On appeal, Stepfather contends that the court erred when it concluded both that Father had not failed to communicate significantly with Child and that Father had not failed to support Child when able to do so. We address each argument in turn.

Significant Communication

[14] Stepfather first contends that the court erred when it concluded that Father had not failed to communicate significantly with Child. “A determination on the significance of the communication is not one that can be mathematically calculated to precision.” *In re Adoption of E.B.F.*, 93 N.E.3d at 763. Even multiple and relatively consistent contacts can be found not significant in context, but a single significant communication within one year is sufficient to preserve a parent’s right to consent to the adoption. *See id.*

[15] On appeal, Stepfather asserts that, “while there may have been some contact with the minor child, that contact was not significant, nor even initiated by [Father].” Appellant’s Br. at 11. And Stepfather contends that “[a]t no time did [Father] request to see the child between 2014 and 2019 and he would only see her occasionally when she was with his mother[.]” *Id.* However,

Stepfather's arguments on appeal are merely a request that we reweigh the evidence, which we cannot do.

[16] The evidence most favorable to the trial court's judgment demonstrates that Father had contact with Child several times per year. Specifically, Mother took Child to visit Father's parents "every few months" between 2014 and 2019, and Father visited with Child during those visits. Tr. at 32. Indeed, Father testified that he would visit with Child at his mother's house "two, three times a year, maybe four." *Id.* at 88. That testimony was corroborated by Father's mother, who testified that, prior to the filing for the petition for adoption, Father would come over to her house and visit with Child when Child was there. And Mother testified that, during those visits, Father would "interact" with Child, "cook[] her meals," and "ask[] her if she needed anything." *Id.* at 63.

[17] In addition, Father's sister testified that, between August 2018 and August 2019, Child visited Father's mother's house "five or six times" and that Father only "miss[ed] one or two" of those visits." *Id.* at 80. Further, Father's sister testified that Father would stay with Child for "[a]n hour or two" at each visit and that, during those visits, Father "played videogames" with Child, "played boardgames" with Child, and "tried teaching" Child about "hunting and shooting stuff." *Id.* at 75, 80. And even Mother acknowledged that she had learned "after the fact" that Father was present during Child's visits with Father's mother during that time period. *Id.* at 33.

[18] Then, in 2019, Father contacted Mother directly about seeing Child, and he began to visit with Child after the court issued an order to phase in visitation. At that point, Father visited with Child “regularly.” *Id.* In other words, the evidence most favorable to the trial court’s judgment shows that, between 2014 and 2019, Father visited with Child several times per year while Child was at Father’s mother house and that those visits lasted for an hour or two and included meaningful interaction between Father and Child. And Father regularly visited with Child beginning in 2019. That evidence supports the court’s finding that Father did not fail to significantly communicate with Child for one year.

Support

[19] Stepfather also contends that the court erred when it concluded that Father’s consent to the adoption was required because Father had not failed to provide support for Child. Specifically, Stepfather asserts that the “testimony and evidence was irrefutable that no support was paid in the one year prior [to] the filing of the Petition” and that “there was only one payment made between January 2018 and May 2020.” Appellant’s Br. at 12.

[20] Father does not dispute that he failed to make any child support payments for the one-year period prior to the filing of the adoption petition. Nor does he dispute that he only made two payments between 2017 and October 2020. But as this Court has stated, “consent is only unnecessary for an adoption petition when a parent ‘fails to provide for the care and support of the child *when able to do so.*’” *C.L.S. v. A.L.S. (In re Adoption of M.S.)*, 10 N.E.3d 1272, 1280 (Ind. Ct.

App. 2014) (quoting I.C. § 31-19-9-8(a)(2)(B)) (emphasis original to *In re Adoption of M.S.*). Thus, the question is not simply whether Father failed to make the child support payments but, rather, whether Father failed to make those payments when he had the ability to do so.

[21] And, here, the evidence most favorable to the court’s judgment demonstrates that Father did not have the ability to make the required child support payments. Indeed, Father testified that he sustained a serious injury in 2017 that resulted in him losing his job because he was not “physically able” to do the work required. Tr. at 85. That injury required Father to undergo several surgeries and resulted in Father filing a claim for disability benefits. Then, shortly after Father lost his job, Father’s driver’s license was suspended due to his child support delinquency, which resulted in further difficulty earning any money. But as soon as Father’s license was reinstated following the garnishment of his COVID stimulus check, Father began making money in ways that he was able, such as helping his grandfather and babysitting his sister’s children. And he used that money to make payments on his child support obligation. That evidence supports the court’s finding that Father did not fail to make child support payments when able to do so.

[22] In sum, the court did not err when it concluded that Father had not failed to communicate significantly with Child and that Father had not failed to support Child when he had the ability to do so. The court therefore did not err when it concluded that Father’s consent to the adoption was required. And because Father’s consent was required but not obtained, the court did not err when it

granted Father's motion to contest the adoption and dismissed Stepfather's petition. We affirm the court's judgment.

[23] Affirmed.

Riley, J., and Brown, J., concur.