ATTORNEY FOR APPELLANT

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IN THE COURT OF APPEALS OF INDIANA

In Re the Adoption of E.B. (Minor Child)

and

K.M. (Biological Mother),

Appellant-Respondent,

v.

J. B. and M-A.B. (Adoptive Parents),

Appellee-Petitioners.

February 15, 2021

Court of Appeals Case No. 20A-AD-1440

Appeal from the Johnson Superior Court

The Honorable Kevin M. Barton, Judge

Trial Court Cause No. 41D01-1810-AD-65

Tavitas, Judge.

Case Summary

[1] After a guardianship spanning approximately five years, J.B. and M-A.B filed a petition to adopt their niece, E.B. ("Child"). K.M. ("Mother"), the Child's

birth mother, opposed the adoption. Nevertheless, because Mother's visitation during the guardianship had been intermittent and because Mother had never provided monetary child support, the adoptive parents argued that Mother's consent to the adoption was not required under Indiana law. After an evidentiary hearing, the trial court agreed, finding that Mother's consent was not required because there was a two-year period during which Mother was capable of providing child support and chose not to. After a careful review of the record, we agree with the trial court. Accordingly, we will not disturb the trial court's decision, and we affirm its ruling that Mother's consent to the adoption was not required.

Issue

[2] Mother raises a lone issue which we restate as whether the trial court erred when it concluded that Mother's consent was not required for the adoption.

Facts

[3] The Child was born February 24, 2008, to Mother and P.B. ("Father"). In 2013, J.B. and M-A.B. were appointed permanent co-guardians of the Child, apparently as a result of Mother's arrest for a conversion charge. J.B. is Father's brother and, thus, the Child's uncle. The guardianship order contained provisions for visitation between Mother, Father, and the Child; however, no formal child support order was issued.

[4] Over the course of the next five years, visitation between Mother and the Child was sporadic. According to the co-guardians, there was a period of

approximately two years, between early 2014 and 2016 where Mother had no visitation with the Child.[1] Even after 2016, Mother was "quite inconsistent about showing up on time, not showing up at all, a lot of times." Tr. Vol. II p. 18. Mother experienced "legal trouble," including a warrant for her arrest and some periods of incarceration, *id*. at 19, intermittent drug use, significant medical issues requiring hospitalization, and a hiatus from work for two years between 2016 and 2018.

[5] The last contact between Mother and the Child appears to have been in approximately September 2018, and the co-guardians filed an adoption petition in October 2018, alleging that:

> consent of the natural mother is not necessary as she has not substantially communicated with the child for a period in excess of one (1) year; [Mother] has had no contact with the child for six (6) months immediately preceding the filing of this action; [Mother] is not a fit person to parent the child; and [Mother] has contributed nothing by way of support of said child for a period in excess of one (1) year.

Appellant's App. Vol. II p. 26.

[6] At an evidentiary hearing on November 20, 2019, Mother recounted her work history and expenses. Mother testified to her belief that, during 2014 and 2015,

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[1] There is conflicting testimony throughout the record about the number, frequency, and nature of the visits that occurred over the course of the five-year-guardianship. Given that this case does not turn on those issues, however, we need not detail those conflicts here.

Mother was capable of taking care of the Child and that she wanted the guardianship dissolved during those years. Mother further admitted that she was using some of her income to purchase drugs in 2014. From October 2014 to February 2015, Mother worked at Statosphere at a wage of $8.75 per hour. During that period she was living with a boyfriend and contributing to expenses, including $100 per month for electric, $400 per month for rent, and $75 per week for child care (for a child other than E.B.).

[7] Mother worked at Amos Hill at a wage of $8 per hour between approximately February 2015 and October 2015. By this time, Mother was living with her father and contributing to expenses, including an electric bill that was $400 to $500 during the winter months and $150 to $200 during the warmer months. Mother then worked at Drug Plastics Closures from November 2015 to August 2016 at a wage of $13.25 per hour. She testified that she was living with her father during this time and that her expenses included $400 to $500 per month for electric during the winter months, $140 per week for house arrest fees, $33 per week for insurance for a different child, and an estimated $100 per month for cigarettes. Her expenses did not include any child support payments for the Child.

[8] Mother testified that, from August 2016 to May 2019, she was unemployed and, for the most part, medically unable to work. During that period, Mother's family helped her with expenses and living arrangements, and she did not receive any social security benefits. At the time of the hearing, Mother worked at Drug Plastics Closures at a wage of $14 per hour. Mother conceded that, as

of the time of the hearing, she was willfully not paying child support, though she was apparently able.

[9] Though Mother conceded that she had never provided monetary support for the care of the Child, there was conflicting testimony about how often Mother provided gifts for the Child. The record suggests agreement that Mother provided Christmas gifts for the Child in 2017. Mother and adoptive father, J.B., disagree, however, as to whether Mother ever purchased the Child any clothing, with the possible exception of a single pair of shoes; ever provided any food; and with the exceptions of the aforementioned shoes and Christmas presents, provided anything in the way of support for the Child. Mother testified that she consistently provided presents for Christmas and birthdays.

[10] On February 12, 2020, the trial court entered findings of fact and conclusions thereon, including, inter alia:

> 32. For purpose of application of Indiana Code 31-19-9-8(a)(2)(b) child support cannot be set in such an amount that the parent is deprived of the means of self support at a subsistence level. [ ] It is not only the income of the parent that must be considered but also the expenses. *Evans v. Murray*, 815 N.E.2d 216, 221 (Ind. Ct. App. 2004); *Bruick v. Augustyniak*, 508 N.E.2d 1307, 1309 (Ind. Ct. App. 1987). Lack of a source of income deprives a parent of the ability to support a child. *McElvain v. Hite*, 800 N.E.2d 947, 950 (Ind. Ct. App. 2003).
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> 33. The Indiana Child Support Guidelines provides that when the joint income of the parents is $100 per week, the child support obligation is $12.00 per week. The Commentary to Guideline Two does recognize that the child support amount

> may be less than $12.00 per week in situations where income is less than $100 per week.
>
> 34. Here, [Mother] was employed during the period of October, 2014 through August, 2016. During the period of time, she was either living with a boyfriend or with her father. She was receiving assistance with living expenses. Without considering the in kind benefits, her income was in excess of $100 per week. She contributed towards expenses. Her income was above subsistence. The Indiana Child Support Guidelines would impose an obligation to pay support in [Mother's] circumstances.
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> 35. [Mother] testifie[d] to providing Christmas presents and birthday presents to [the Child]. [Guardian] acknowledged that Christmas presents were purchased in 2014 and 2015. The presents consisted of a toy, shoes or clothing.
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> 36. The presents were no more than token efforts under Indiana Code 31-19-9-8(b).
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> 37. The Court concludes that the provisions of Indiana Code [Section] 31-19-9-8(a)(2)(B) have been satisfied by clear and convincing evidence.

Appellant's App. Vol. II pp. 16-17. Having found that Mother's consent was not required, the trial court later granted the petition for adoption. Mother now appeals.

Analysis

[11] Mother contends that the trial court erred when it concluded that her consent was not required for the adoption. We first note that the adoptive parents did

not file an appellees' brief. "[W]here, as here, the appellees do not submit a brief on appeal, the appellate court need not develop an argument for the appellees 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) (quoting *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*. 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." *Jenkins v. Jenkins*, 17 N.E.3d 350, 352 (Ind. Ct. App. 2014) (citing *Wright v. Wright*, 782 N.E.2d 363, 366 (Ind. Ct. App. 2002)). We are obligated, however, to correctly apply the law to the facts in the record in order to determine whether reversal is required. *Id*. (citing *Trinity Homes, LLC v. Fang*, 848 N.E.2d 1065, 1068 (Ind. 2006)).

[12] "We presume the trial court's decision is correct, and we consider the evidence in the light most favorable to the decision." *In re Adoption of T.L.*, 4 N.E.3d 658, 662 (Ind. 2014) (citing *Rust v. Lawson*, 714 N.E.2d 769, 771-72 (Ind. Ct. App. 1999), *trans. denied*). "'When reviewing a trial court's ruling in an adoption proceeding, we will not disturb that ruling unless the evidence leads to but one conclusion and the trial judge reached an opposite conclusion.'" *Matter of Adoption of C.A.H.*, 136 N.E.3d 1126, 1128 (Ind. 2020) (quoting *T.L.*, 4 N.E.3d at 662). "[W]e do not reweigh the evidence on appeal, but instead examine the evidence most favorable to the trial court's decision, together with reasonable

inferences drawn therefrom." *In re Adoption of M.S.*, 10 N.E.3d 1272, 1282 (Ind. Ct. App. 2014) (citing *In re Adoption of M.L.*, 973 N.E.2d 1216, 1222 (Ind. Ct. App. 2012)). We give considerable deference to the trial court with respect to family law claims, "as we recognize that the trial court 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." *Id*.

[13] When, as in this case, the trial court has made findings of fact and conclusions of law, we apply a two-tiered standard of review: "we must first determine whether the evidence supports the findings and second, whether the findings support the judgment." *In re Adoption of T.W.*, 859 N.E.2d 1215, 1217 (Ind. Ct. App. 2006); *see also* Ind. Trial Rule 52(A) (providing that where the trial court has made findings of fact and conclusions of law, "the court on appeal shall not set aside the findings or judgment unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses."). Factual findings "are clearly erroneous if the record lacks any evidence or reasonable inferences to support them [and] . . . a judgment is clearly erroneous when it is unsupported by the findings of fact and the conclusions relying on those findings." *T.W.*, 859 N.E.2d at 1217.

T.L., 4. N.E.3d at 662.

[14] "In an adoption proceeding, the petitioner is required to prove by clear and convincing evidence that a non-custodial parent's consent is not required for the adoption." *M.S.*, 10 N.E.3d at 1279 (citing *In re Adoption of K.S.*, 980 N.E.2d 385, 388 (Ind. Ct. App. 2012)). Under Indiana law, a parent's consent to the adoption of his or her child is not required if: "[F]or a period of at least one (1)

year the parent: . . . (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." Indiana Code § 31-19-9-8(a)(2).

[15] Of importance here is the fact that "'the relevant time period' for determining whether a non-custodial parent has supported his or her child, 'is not limited to either the year preceding the hearing or the year preceding the petition for adoption, but is *any year* in which the parent had an obligation and the ability to provide support, but failed to do so.'" *M.S.*, 10 N.E.3d at 1279 (quoting *In re Adoption of J.T.A.*, 988 N.E.2d 1250, 1255 (Ind. Ct. App. 2013) *reh'g denied*, *trans. denied*) (emphasis original). "It is well-settled that parents have a common law duty to support their children," and that the duty exists independently of any court order or statute. *Boone v. Boone*, 924 N.E.2d 649, 652 (Ind. Ct. App. 2010) (citing *Mariga v. Flint*, 822 N.E.2d 620 (Ind. Ct. App. 2005), *trans. denied*).

[16] Mother argues that "at no time [during the evidentiary hearing] was Mother asked about how many hours per week she worked. Mother was never asked whether her employment was full time or otherwise."[2] Appellant's Br. p. 7 (internal citations omitted). Accordingly, Mother contends, the adoptive parents did not meet their burden to show by clear and convincing evidence that Mother was able but unwilling to make child support payments. In the

[2] We note that the resolution of this case would have been much more straightforward had adoptive parents' counsel simply established how many hours mother worked per week during the relevant timeframe, or taken the obvious step of requesting and submitting mother's W2's and/or tax returns for said period.

alternative, Mother contends that she actually *did* provide significant support, in the form of "non-monetary contributions." *Id.* at 13.

[17] It is clear from the record that Mother's employment was often sporadic. It is also clear that she suffered from significant medical issues for a prolonged period. What is not clear is that the trial court erred when it balanced those factors against the testimony pertaining to Mother's wages, and her apparent ability to successfully pay for various, often significant, expenditures. For this Court to reverse the trial court's ruling, the facts must compel a single conclusion, and the trial court must have reached the opposite conclusion. We are unconvinced that has happened here.

[18] We find *In re Adoption of J.L.J.*, 4 N.E.3d 1189 (Ind. Ct. App. 2014), *trans. denied*, to be instructive. In *J.L.J.*, the trial court determined that a father failed to provide support to his children for at least a year, despite the ability to do so. Though the father in that case was not employed during the relevant time period, the evidence suggested that he did possess the means to afford his own residence, routinely purchase cigarettes, and travel frequently, albeit locally. There was also evidence suggesting that the father in that case received Social Security disability payments. As we explained: "While it is true that Guardian did not offer documentation of Father's financial resources, we must consider the totality of the circumstances in determining the ability of a parent to support his child." *J.L.J.*, 4 N.E.3d at 1195 (citing *In re Adoption of M.A.S.*, 815 N.E.2d 216, 221 (Ind. Ct. App. 2004)). If 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, particularly given that the support guidelines allow for de minimus payments under many circumstances. *Id*. at 1197; Ind. Child Support Guidelines, Form 4, *Guideline Schedules for Weekly Support Payments* (showing payment obligation during the relevant years of $12.00/week for one child when parent's combined weekly income is $100.00).

[19] In the case of *In re Adoption of M.S.*, we found that the trial court properly concluded that the mother had the ability to pay support when: (1) mother was able to work; (2) mother lived in a house purchased by her own mother; (3) mother had redecorated the house; and (4) mother was able to support multiple pets. 10 N.E.3d 1272. The trial court concluded that mother's consent to the adoption was not required, and this Court affirmed.

[20] Mother contends that her ability to pay child support categorically cannot be proven without proof of total income, but we disagree. We agree with the trial court here that, between 2014 and Mother's hospitalization in 2016, she was capable of providing child support, yet chose not to. In fact, Mother appears to agree with that as well. She testified that, during that time period, she believed she could take care of the Child and wanted the guardianship terminated, thereby implying that she could have supported the Child.[3] In short, the fact

[3] Mother's alternate argument, that she did provide support, is similarly unpersuasive. We are unmoved by Mother's argument that a handful of gifts to the Child over the course of six years are anything more than tokens. *See, e.g., In re Adoption of Infants Reynard,* 252 Ind. 632, 251 N.E.2d 413, 416 (1969) (concluding that gift of $75, even though given in the year preceding the adoption, was insufficient to comply with the statute's requirements).

that Mother's total income was never established, standing alone, does not suffice for us to disturb the findings of the trial court.[4] The trial court's finding that Mother, for a period of at least one year, "[k]nowingly fail[ed] to provide for the care and support of the child when able to do so as required by law or judicial decree," is not clearly erroneous. Ind. Code § 31-19-9-8(a)(2). Accordingly, we affirm the trial court's holding that Mother's consent to the adoption was not required.

Conclusion

[21] The trial court's finding that Mother's consent to the adoption was unnecessary was not clearly erroneous. We affirm.

Affirmed.

Bailey, J., and Robb, J., concur.

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[4] Similarly, proof of Mother's total income, standing alone, would not suffice to prove her ability to comply with her common law obligation to support her child. *See, e.g., In Re the Adoption of Auguslyniak*, 508 N.E.2d 1307, 1308 (Ind. Ct. App. 1987) ("A petitioner for adoption must show that the non-custodial parent had the ability to make the payments which (s)he failed to make. That ability, cannot be adequately shown by proof of income standing alone. To determine that ability, it is necessary to consider the totality of the circumstances.").