



ATTORNEY FOR APPELLANT

Ernest P. Galos
Public Defender
South Bend, Indiana

ATTORNEY FOR APPELLEE

Mark F. James
Mark James Legal, LLC
South Bend, Indiana

IN THE
COURT OF APPEALS OF INDIANA

In the Matter of the Adoption of
C.W.;

J.R.,

Appellant-Respondent,

v.

L.W.,

Appellee-Petitioner.

January 30, 2023

Court of Appeals Case No.
22A-AD-1804

Appeal from the St. Joseph Probate
Court

The Honorable Jason A.
Cichowicz, Judge

Trial Court Cause No.
71J01-1601-JP-53

Opinion by Judge Tavitias

Chief Judge Altice and Judge Brown concur.

Case Summary

- [1] J.R. (“Mother”) appeals the trial court’s conclusion that her consent was not required for the adoption of C.A.W. (“Child”) by L.M.W. (“Stepmother”). Mother argues that the trial court erred when it determined that she abandoned

the Child. Stepmother, however, argues that Mother’s consent was not required because Mother knowingly failed, for at least one year, to provide for the care and support of the Child when able to do so as required by law or judicial decree. We conclude: (1) the trial court erred by determining that Mother’s consent was not required due to abandonment; and (2) Stepmother failed to meet her burden of demonstrating that Mother failed to support the Child. Accordingly, Mother’s consent to the adoption was required, and we reverse and remand.

Issue

- [2] Mother raises one issue, which we restate as whether the trial court erred by finding that Mother’s consent to the adoption of the Child was not required.

Facts

- [3] The Child was born on October 20, 2008, to Mother and S.W. (“Father”). Mother and Father executed a paternity affidavit, and the Child remained in Mother’s custody until 2015, when the Child was adjudicated a child in need of services. Father filed a petition to modify custody, and in 2016, the parties entered into an Agreed Order that provided for: (1) joint legal custody of the Child; (2) Father having primary physical custody of the Child; (3) “a child support order in the amount of \$0.00” because the parties agreed to “contribute to the minor child’s expenses equally”; and (4) Mother having “liberal parenting time of every other weekend and at all other time[s] as parties may reasonably agree.” Appellant’s App. Vol. II pp. 57-58.

- [4] Father and the Child lived with Stepmother for approximately three years, and Father and Stepmother married on September 12, 2020. Mother visited with the Child once or twice a month. Mother last saw the Child a few days after his birthday in October 2020. Mother then spoke with the Child the week before Christmas 2020 to make arrangements to see him for the holidays. Mother, however, received a text message from Father that she would not be allowed to see or talk to the Child and that Father was blocking her telephone number. Mother has been unable to speak to or see the Child since that time despite efforts to see the Child at his school and at Father's residence.
- [5] On May 3, 2021, in the paternity action, Mother filed a petition for rule to show cause alleging Father had denied visitation between Mother and the Child. One week later, on May 10, 2021, Stepmother filed a petition to adopt the Child. Stepmother alleged that Mother's consent was not required because Mother had failed, without justifiable cause, to communicate significantly or provide support for at least one year. On June 4, 2021, Mother filed a petition to contest the adoption.
- [6] The trial court conducted an in camera interview and held an evidentiary hearing, which was completed in March 2022. Stepmother argued that Mother's consent was not required because Mother had failed to provide support for the Child for at least one year when she had the ability to do so. On June 29, 2022, the trial court entered findings of fact and conclusions thereon granting the petition for adoption. The trial court found:

1. [Mother] over the years had provided some support for her child with items bought and times they were together at her home including in October of 2020. The Court is not convinced by the petitioner when taking into account prior Judicial Orders that [Mother] had the ability to provide support for the child.

2. [Mother] had not seen or communicated with the Child since October of 2020 and the Petition for Adoption was filed on May 10, 2021.

3. The Court finds that [Mother] played a very sporadic role in the Child's life and would abandon the Child for significant time over the years including for the six (6) months immediately preceding the filing of the Petition for Adoption.

Id. at 16. Mother now appeals.

Discussion and Decision

[7] Mother contends that the trial court erred when it concluded that her consent was not required for the adoption. “We 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.’” *Matter of 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)). “[W]hen 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.* “[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)).

“We will not reweigh evidence or assess the credibility of witnesses.” *Id.*

“Rather, we examine the evidence in the light most favorable to the trial court’s decision.” *Id.*

[8] 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.” *Id.* 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). Two of the enumerated circumstances are relevant here.

[9] Indiana Code Section 31-19-9-8 provides:

(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.

[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.”¹ *I.B.*, 163 N.E.3d at 274 (citing I.C. § 31-19-10-1.2(a)). “The

¹ Although not mentioned by the parties, we note that Indiana Code Section 31-19-10-1.4(b) was added effective July 1, 2021, and provides:

If a petition for adoption alleges that a parent’s consent to the adoption is unnecessary under IC 31-19-9-8(a)(1) or IC 31-19-9-8(a)(2) and the parent files a motion to contest the adoption under section 1 of this chapter, 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-

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. Accordingly, Stepmother had the burden of demonstrating that Mother’s consent to the adoption was not required.

I. Abandonment

[11] Mother challenges the trial court’s finding that she abandoned the Child for six months. Stepmother and Father do not address this argument. Although Stepmother never argued to the trial court that Mother had abandoned the Child, the trial court concluded that “[Mother] had not seen or communicated with the Child since October of 2020 and the Petition for Adoption was filed on May 10, 2021,” and that Mother abandoned “the Child for significant time over the years including for the six (6) months immediately preceding the filing of the Petition for Adoption.” Appellant’s App. Vol. II p. 16. Mother, however, argues the evidence is insufficient to demonstrate abandonment because: (1) Mother last saw the Child for his birthday in October 2020 and spoke to him shortly before Christmas 2020; and (2) beginning in December 2020, Father and Stepmother cut off Mother’s communication with the Child.

[12] In order for a parent’s consent to be dispensed with under this section, the parent must have “abandoned or deserted [the child] for at least six (6) months

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.

immediately preceding the date of the filing of the petition for adoption.” I.C. § 31-19-9-8(a)(1). We first note that the trial court’s finding that Mother abandoned the Child for “significant time over the years” is not supported by the evidence. Rather, the evidence demonstrated that Father gained custody of the Child in 2016, and Mother was granted parenting time, which she exercised once or twice a month. Moreover, Mother testified that she spoke with the Child shortly before Christmas 2020, which is less than six months before Stepmother filed the petition to adopt the Child on May 10, 2021.

[13] Finally, our Supreme Court has held: “A custodial parent’s efforts to thwart communication between the non-custodial parent and her child are relevant to determining the non-custodial parent’s ability to communicate and should be weighted in the non-custodial parent’s favor.” *E.B.F.*, 93 N.E.3d at 766. Mother testified that she received a text message from Father, which stated that she would not be allowed to see or talk to the Child and that Father was blocking her telephone number. Mother has been unable to speak to or see the Child since that time despite her efforts to see the Child. In response to the denial of parenting time, on May 3, 2021, Mother filed a petition for rule to show cause why Father should not be held in contempt for Father’s denial of Mother’s parenting time with the Child. Stepmother admitted in her testimony that Father denied Mother’s visits with the Child. Father testified that he refused to allow Child to have contact with Mother and blocked Mother’s text messages.

[14] The evidence is clear that Father thwarted communication between Mother and the Child. In *E.B.F.*, our Supreme Court declared: “We cannot allow a custodial-parent to fend off a non-custodial parent’s attempts to communicate with her child just long enough to wipe away the non-custodial parent’s right to withhold consent to an adoption.” 93 N.E.3d at 767. As in *E.B.F.*, Father and Stepmother’s “thwarting effectively impeded Mother’s ability to communicate with Child.” *Id.* Under these circumstances, despite the deference we provide to trial courts in these matters, we must conclude that the trial court erred by finding Mother abandoned the Child for at least six months prior to the filing of the petition for adoption. Indiana Code Section 31-19-9-8(a)(1), thus, does not provide a basis for finding that Mother’s consent was not required.

II. Failure to Provide Support

[15] Stepmother argues that Mother’s consent was not required because Mother failed to support the Child for at least one year. Consent to adoption is not required from:

A parent of a child in the custody of another person if for 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.

I.C. § 31-19-9-8(a)(2). Our Supreme Court has held: “A petitioner for adoption must show that the noncustodial parent had the ability to make the payments

that she failed to make.” *I.B.*, 163 N.E.3d at 277. “A court must look at the totality of the circumstances to determine the parent’s ability to pay, not just his or her income (or lack of income).” *Id.*

[16] At the adoption hearing, Stepmother argued that Mother failed to provide support to the Child for at least one year. The trial court rejected Stepmother’s argument in its findings:

[Mother] over the years had provided some support for her child with items bought and times they were together at her home including in October of 2020. The Court is not convinced by the petitioner when taking into account prior Judicial Orders that [Mother] had the ability to provide support for the child.

Appellant’s App. Vol. II p. 16.

[17] In 2016, Mother and Father entered into an Agreed order, in which no support order would issue to either parent. The parties agreed to “contribute to the minor child’s expenses equally.” *Id.* at 58. Mother testified that she purchased items for the Child to use at her home and that she helps with “school supplies every other year.” Tr. Vol. II p. 62. Father, however, testified that Mother has never contributed to school supplies or clothing for the Child. Mother lives with maternal grandmother and helps maternal grandmother pay for utilities. Mother was employed as her sister’s babysitter until shortly before the evidentiary hearing, at which time she was employed at David’s Bridal. While babysitting, Mother earned approximately \$200.00 every other week. Mother also received unspecified unemployment benefits.

[18] The trial court was unpersuaded that Mother had the ability to provide support for the Child given the prior order in the paternity case, which did not order Mother to pay any child support. Although the parties disputed the amount of items Mother gave the Child, the trial court, in determining the credibility of the testimony, found that Mother did provide some items for the Child. “A parent’s nonmonetary contribution to a child’s care may be counted as support.” *In re Adoption of M.B.*, 944 N.E.2d 73, 77 (Ind. Ct. App. 2011). Stepmother is merely requesting that we reweigh the evidence, which we cannot do. Under these circumstances, we cannot say the trial court erred in concluding that Indiana Code Section 31-19-9-8(a)(2) did not provide a basis by which to dispense with the consent requirement.

Conclusion

[19] The trial court erred by concluding that Mother’s consent to the adoption was not required because she abandoned the Child under Indiana Code Section 31-19-9-8(a)(1). Moreover, Stepmother failed to meet her burden of demonstrating that Mother’s consent is not required for the adoption pursuant to Indiana Code Section 31-19-9-8(a)(2). Accordingly, Mother’s consent to the adoption was required, and the trial court erred by granting the adoption without Mother’s required consent. We reverse and remand for further proceedings consistent with this opinion.

[20] Reversed and remanded.

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