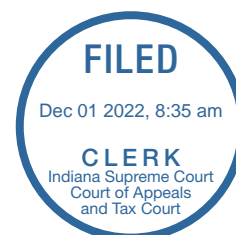


MEMORANDUM DECISION

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.



ATTORNEYS FOR APPELLANT

C. Matthew Zentz
Thomas Roberts
Indianapolis, Indiana

IN THE COURT OF APPEALS OF INDIANA

In re the Adoption of Minor
Child E.S.J.

J.T.J. and H.M.B. (Mother),
Appellants-Petitioners,

v.

B.J. (Father),
Appellee-Respondent.

December 1, 2022

Court of Appeals Case No.
22A-AD-1033

Appeal from the Johnson Superior
Court

The Honorable Kevin Barton,
Judge

Trial Court Cause Nos.
41D01-2110-AD-83, 41D01-2111-
JP-186

Altice, Judge.

Case Summary

- [1] H.M.B. (Mother) and J.T.J. (Stepfather) petitioned for Stepfather to adopt E.S.J. (Child), and B.J. (Father) objected. In this interlocutory appeal, Stepfather and Mother (collectively, Petitioners) appeal the trial court's order finding that Father's consent was required for the adoption. They raise two issues that we consolidate and restate as: Did the trial court err when it determined that Petitioners did not establish that Father's failures to communicate with and provide financial support for Child occurred when Father was able to do so?
- [2] We affirm.

Facts & Procedural History

- [3] Mother and Father started a relationship around October 2017, and, at some point, began living together. Child was born on October 31, 2019, and Father executed a paternity affidavit at that time. The parties continued living together, until a domestic incident occurred between them on June 6 or 7, 2020. As a result of that incident, Father was arrested and charged with domestic battery in the presence of a minor, strangulation, and disorderly conduct in the Morgan Superior Court (the Morgan County court) under Cause No. 55D01-2006-F6-872. Father was incarcerated for a few days and released. Meanwhile, Mother left the residence with Child, and Father was not aware where she and Child resided then or at any time afterward.

[4] On June 8, 2020, the Morgan County court entered a form no contact order that restrained Father from “any contact with” Mother. *Exhibits Vol.* at 4. The same day, the court issued a separate “No Contact Order Upon Release from Custody on Bail or Personal Recognizance,” which provided, in relevant part, that as a condition of Father’s release from custody pending trial he have no contact with Mother

in person, *by telephone or letter, through an intermediary, or in any other way, directly or indirectly, except through an attorney of record,* while released from custody pending trial. This includes, but is not limited to, acts of harassment, stalking, intimidation, threats, and physical force of any kind.

Id. at 5 (emphases added). The order continued in effect until Father “has been sentenced if found guilty” and that “[v]iolation of this order is punishable by confinement in jail, prison and/or a fine.” *Id.* at 6.

[5] In or around August 2021, Father filed a paternity action in the Morgan Circuit Court under Cause No. 55C01-2108-JP-261, to address issues of child support and parenting time.¹ On October 7, 2021, Father pled guilty to Level 6 felony strangulation for the June 2020 incident, and he was sentenced to Morgan County Jail for a period of sixty days. That day, the Morgan County court entered another form no contact order that restrained Father from “any contact” with Mother and was effective until April 7, 2023. *Id.* at 8. The court

¹ This cause was subsequently transferred to the Johnson County court, in October 2021, for consolidation with the adoption petition at issue herein, and was re-docketed as Cause No. 41D01-2111-JP-186.

also issued a separate “No Contact Order While on Probation [] or Serving Executed Sentence,” which like the previous no contact order, provided, in relevant part, that Father was to have no contact with Mother

in person, by telephone or letter, through an intermediary, or in any other way, directly or indirectly, except through an attorney of record, while on probation. This includes, but is not limited to, acts of harassment, stalking, intimidation, threats, and physical force of any kind.

Id. at 9 (emphases added). The order advised:

Violation of this order constitutes violations of Indiana Code § 35-38-2-2.3 and Indiana Code § 35-46-14 5.1 and may also subject the defendant to federal prosecution. . . . Violation of this order is punishable by confinement in jail, prison and/or a fine.

Id. at 10.

[6] On October 8, 2021, Petitioners filed the instant petition for adoption in the Johnson Superior Court, alleging that Father’s consent was not required under Ind. Code § 31-19-9-8(a)(2) because, for a period of one year and when able to do so, Father failed without justifiable cause to communicate significantly with Child and failed to pay child support.

[7] Father filed a motion to contest the adoption on October 19, 2021, as amended on October 22. He did not dispute that, for a period of at least a year, he did not communicate with Child and did not provide any support for Child. Rather, he asserted that he “has been unable to contact Mother regarding the

child due to a no-contact order being in place and a pending criminal matter” and that “[his] intent was to pursue reestablishment of his relationship after the criminal case was close to resolution [and he] did in fact pursue paternity when his criminal case was close to resolution.” *Appellant’s Appendix* at 22.

[8] The trial court held a hearing on February 2, 2022. Father testified that he had no knowledge of where Mother and Child were residing at any point after the June 2020 incident. Father acknowledged that he knew that the no contact order did not expressly prohibit him from contacting Child but testified that due to the existence of the no contact order and the age of Child, he did not believe he could communicate with Child without contacting Mother, which would violate the order. Father testified to his understanding that the no contact order prevented him, not only from contacting Mother by phone or letter, but also disallowed indirect communication such that he could not have someone else, such as his father, contact Mother on his behalf.

Q. Was there any way that you could send your daughter a birthday card?

A. No.

Q. Christmas card?

A. No.

Transcript at 17. Father testified that, in October 2020, he asked his then-appointed counsel “multiple times” what he could do to see Child but she did

not respond, after which and with the assistance of his father, he hired his current attorney. *Id.* at 9.

[9] There was inquiry and testimony about why Father did not file a paternity action sooner. Father testified that, in May 2021, he went to the hospital where Child was born to get a copy of the paternity affidavit to submit with his paternity filings, but he did not file the paternity action until August 2021 on the advice of his lawyer due to continuing negotiations in the criminal case. Opposing counsel then questioned Father:

Q. Correct me if I'm wrong here, but you believe that by trying to enforce or get a Court order to see your child, or to do any of that, that that would be somehow detrimental to your criminal case?

A. Yes.

Q. So is it fair to say you put your own interest above you seeing your child during that time period from June 6 of 2020 through today?

A. No, it was in the interest of my son.

Q. Okay so I'm confused, I mean, so you just said you did it because you were afraid it might complicate your criminal case.

A. Yes.

Id. at 27. Father's counsel asked Father to further explain:

A. Yeah, my son was diagnosed with autism early in the year, and I'm the only person he really talks to. So, I don't want to make it any worse than it was already going to be.

Q. By not making it any worse, do you mean going to jail, or effecting [sic] your criminal case?

A. Correct.

Q. So [Father], you have his interest in mind as well, correct?

A. Yes.

Q. Is it fair to say you've been trying to sort out one issue at a time?

A. Yes.

Id. at 28.

[10] Father was questioned about his income and expenses. He testified that in August and September 2020, he worked at For Bare Feet sock company forty hours per week at an hourly rate of \$10 per hour, in October and November 2020 he worked at Burger King thirty hours per week at \$12 per hour, then beginning in December 2020, he worked at Arby's thirty to forty hours per week at an hourly rate of approximately \$13.00 per hour. Father's expenses included the rent in his Section 8 housing, car insurance, a cell phone, probation fees, counseling costs, and caring for his six-year-old son of whom he has joint custody. Father acknowledged that, while not having much money

remaining after expenses, he had the ability to pay some financial support for Child but expressed that he did not know how to get money to Mother without violating the no contact order:

Q: [Father], during that timeframe, was there any child support account set up through the Court that you're aware of?

A. No.

Q. Was there any way that you're aware of that you could have paid mother money?

A. No.

Id. at 17. When asked on cross-examination whether he made “any effort whatsoever to make any support payments or to support your child financially,” Father replied, “I have not. I didn’t know who to pay or how to do it.” *Id.* at 24.

[11] Father’s counsel called Mother as a witness. She testified that after the June 2020 incident, she wanted the no contact order in place, did not contact Father at any time, and did not advise him where she and Child were living or staying. She was asked and answered:

Q. What would you have done if [Father] would have sent you a text message?

A. Depending on what it was in regards to. If he was asking about his daughter, I wouldn't have been too upset about that, but that's just because that's me.

Q. Was your understanding of the protective order that any text, no matter the nature, would have been a violation?

A. Yeah.

Id. at 37. She testified that, prior to June 2020, she had a relationship with Father's family but had no contact with any of them since that time, and Child had not been in their care since then.

[12] Mother testified that she never asked Father for any child support because she "didn't need it," but clarified that if Father had offered, she would have accepted it. *Id.* She suggested that Father could have provided support "through mail," explaining, "He knew where my mom and dad lived, so I may not have been there, but, it would have gotten to me." *Id.* at 41.

[13] The trial court took the matter under advisement, and the parties submitted post-trial briefs for the court's consideration. On March 12, 2022, the trial court issued an order (the Order) determining that Father's consent to the adoption was required. With regard to Father's communication with Child, the trial court determined that Father had not communicated with Child for a period in excess of one year and the issue was whether Father failed to communicate "when able to do so." *Appellant's Appendix* at 30. The court explained,

23. Petitioner[s] assert[] that Father was not prohibited from communicating with the [C]hild but only the Mother. However, given that the child was seven months old on June 7, 2020 and two years three months old at the time of hearing, it is unclear how communication could occur without going through Mother. The No Contact Order is broad and covers communications “in person, by telephone or letter, through an intermediary, or in any other way, directly or indirectly”.

* * *

25. The No Contact Order contained an exception if contact was made through an attorney of record. Father acknowledged that he did not request that [the Morgan County court] amend the No Contact Order. However, he testified that he had made the request to counsel.

26. Any contact that Father made with Mother, even though for the purpose of contact with the child, would subject Father to an invasion of privacy charge.

27. Based upon the No Contact Orders, the Court is unable to find that Father had the ability to communicate with the child for purposes of Indiana Code 31-19-9-8(a)(2)(A).

Id.

[14] With regard to the matter of support for Child, the trial court found that the evidence established that Father did not provide for Child’s care and support for

a period in excess of one year,² and the issue was whether he failed to support Child “when able to do so.” *Id.* at 31. The court stated:

29. Father acknowledged that he could have paid some money to help support the child. Indeed, during the period from June 6, 2020 to October 7, 2021 and before Father was required to pay for home detention, probation and counseling, Father’s only identified expenses were for rent, food, gas, insurance and supplies. His expenses would have totaled approximately \$844.00 per month. He was continually employed. Even his lowest income would have resulted in a net income in excess of his expenses.

30. Father asserts that he was unable “to do so” due to the No Contact Order.

31. Father is correct in that he would have been unable to simply forward payment of child support to Mother under the terms of the No Contact Order.

Id. The court recognized that, while another option for payment of support would have been for Father to pay funds for the support of Child through the Clerk, in this case, “[n]o support docket has ever been authorized or established as would have permitted the Clerk to accept support payments.” *Id.* The court concluded with regard to support,

² The court recognized that “Even in the absence of a child support order, a parent has the legal obligation at common law to provide for the support of a child.” *Appellant’s Appendix* at 30-31 (citing *In Re Adoption of M.B.*, 944 N.E.2d 73, 77 (Ind. Ct. App. 2011)).

35. [] Before being divested of a constitutional right, Father has to have a means to comply with his legal obligation. The No Contact Order precluded Father from forwarding support to Mother. A means was not otherwise established by either parent for support to get to Mother.

Id. at 32.

[15] The court summarized that “before Father’s consent can be waived, there has to be a method established to both communicate with the child and to pay support for the child,” and, here, the court was “unable to find” that Petitioners had met their burden to show that Father’s consent was not required under either the communication or the support subsections of the statute. *Id.* The trial court granted Petitioners’ request to certify the Order, and this court accepted jurisdiction. Petitioners now appeal.

Discussion & Decision

[16] It is well established that a trial court’s decision in a family law matter is generally entitled to “considerable deference” on appeal. *D.G. v. D.H.*, 182 N.E.3d 247, 251 (Ind. Ct. App. 2022). This is in recognition of the fact 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.” *Id.* (quoting *Matter of Adoption of I.B.*, 163 N.E.3d 270, 274 (Ind. 2021)). 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. *K.H. v. M.M.*, 151 N.E.3d 1259, 1265

(Ind. Ct. App. 2020), *trans. denied*. We will neither reweigh the evidence or judge the credibility of witnesses; instead, we will consider the evidence most favorable to the trial court's decision, and the reasonable inferences to be drawn therefrom, to determine whether sufficient evidence exists to sustain the decision. *In re Adoption of S.W.*, 979 N.E.2d 633, 639 (Ind. Ct. App. 2012). The trial court's findings and judgment will be set aside only if they are clearly erroneous. *K.H.*, 151 N.E.3d at 1265. A judgment is clearly erroneous when there is no evidence supporting the findings or the findings fail to support the judgment. *Id.* We will not disturb the trial court's ruling unless the evidence leads to only one conclusion and the court reached an opposite conclusion. *S.W.*, 979 N.E.2d at 639.

[17] A natural parent enjoys special protection in any adoption proceeding, and courts strictly construe our adoption statutes to preserve the fundamentally important parent-child relationship. *In re Adoption of W.K.*, 163 N.E.3d 370, 374 (Ind. Ct. App. 2021), *trans. denied*. Generally, parental consent is required to adopt a child in Indiana. *See* Ind. Code § 31-19-9-1. However, consent to adoption is not required from, as is relevant here:

(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.

I.C. § 31-19-9-8(a)(2). For purposes of that subsection, the one-year period is any one year in which the parent had the obligation. *In re Adoption of J.T.A.*, 988 N.E.2d 1250, 1255 (Ind. Ct. App. 2013), *trans. denied*. A party seeking to adopt bears the burden of proving by clear and convincing evidence that a noncustodial parent's consent is not required. *D.G.*, 182 N.E.3d at 251; *Matter of Adoption of E.M.L.*, 103 N.E.3d 1110, 1116 (Ind. Ct. App. 2018), *trans. denied*.

[18] Petitioners argue that “[t]he existence of a No Contact Order between Father and Mother did not preclude Father from communicating with or providing support for [Child],” and thus the trial court erred when it concluded that Father’s consent was not required for the adoption. *Appellant’s Brief* at 9.

[19] Before we begin our analysis, we observe that Father did not file an appellee’s brief and, in such a case, “we need not develop an argument for the appellee[] but instead will reverse the trial court’s judgment if the appellant’s brief presents a case of prima facie error.” *In re Adoption of E.B.*, 163 N.E.3d 931, 935 (Ind. Ct. App. 2021) (internal quotation omitted). 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.’” *Id.* (quoting *Jenkins v. Jenkins*, 17 N.E.3d 350, 352 (Ind. Ct. App.

2014). We are obligated, however, to correctly apply the law to the facts in the record in order to determine whether reversal is required. *Id.* at 936.

[20] In this case, there is no dispute that, for a period in excess of a year, Father had no communication with Child and did not provide care or support for her. The issue is whether Petitioners proved by clear and convincing evidence that Father failed, without justifiable cause, to communicate with Child when he was able to do so and failed to provide support when able to do so. Father did not contend below that his failure to do either of those two things was because of his incarceration. Nor did he assert that his income and expenses did not allow him to pay support, or that he did not have a common law duty to support Child in the absence of a support order. Rather, he asserted that he was unable to communicate with Child and did not know how to get child support to Mother because of the two no contact orders, one put in place in June 2020 upon Father's arrest and then another when he pleaded guilty in October 2021.

Communication

[21] Petitioners acknowledge that “[g]iven the child’s age, Father could not contact the child by phone without contacting Mother” but argue that Father nevertheless “had the ability to contact the child by card or letter, without having to communicate with Mother,” suggesting that he “could have easily sent cards and letters to Mother’s parents’ address for [Child].” *Appellant’s Brief* at 11. We are not persuaded, however, that Father had any reasonable and effective means of communicating significantly with Child. First, Father testified that he did not know where Mother and Child were living at any point

after they moved out in June 2020. Second, even if he did know, and even if that was with Mother's parents, Father was precluded by the no contact orders from contacting Mother, directly or indirectly, such as through her parents. Third, given Child's young age – seven months old when Father was arrested and just over two years old at the time of the adoption hearing – she would not have been independently opening and reading cards without Mother's involvement or that of some other person on her behalf. Thus, Father could not correspond directly with Child, as Petitioners suggest, without risking violation of the no contact order that prohibited direct or indirect communication with Mother.

[22] Father testified that, initially, he did not know how, without violating the no contact order, to arrange any parenting time, or if that would be allowed. In fall 2020, he testified that he asked his then-attorney how to contact Child but received no response. After obtaining new counsel, Father filed the paternity action in August 2021, to begin the process of arranging parenting time and setting support. As of the date of the adoption hearing in February 2022, no hearing had been held in the paternity action, although he had requested one. We recognized that by the time he filed the paternity action, Father already had not communicated with Child for a year, from June 2020 to June 2021, thus meeting the statutory one-year requirement. However, Father testified that his decision to wait until August 2021 to file the paternity action was based upon the advice of his counsel due to the pending criminal action in which he had yet to receive his sentence, which Father did not want to risk making worse, i.e.,

more jail time, given his joint custody of his son. He concluded that the best strategy was to try to sort out one matter at a time. The trial court clearly found Father’s testimony credible and concluded, based on the totality of the evidence, that Father had not failed, without justifiable cause, to communicate with Child when able to do so.

[23] Petitioners urge, “There is no exception provided for in the statute for lack of communication due to a No Contact Order” and “[i]f the legislature wanted to allow for such an exception, they would have included one.” *Appellant’s Brief* at 12. We disagree that an express statutory exception is required. The statute leaves discretion to the trial court to determine if justifiable cause existed and if the parent’s failure to communicate occurred when able to do so. We cannot say that the trial court’s conclusion – that Petitioners did not meet their burden to establish that Father failed, without justifiable cause, to communicate significantly with Child when able to do so – was clearly erroneous.

Child Support

[24] A petitioner for adoption must show that the non-custodial parent had the ability to make the payments which he failed to make. *In re Adoption of K.S.*, 980 N.E.2d 385, 388 (Ind. Ct. App. 2012). The ability to pay “cannot be adequately shown by proof of income standing alone,” and “it is necessary to consider the totality of the circumstances.” *M.S.*, 10 N.E.3d at 1281 (quoting *In re Adoption of Augustyniak*, 508 N.E.2d 1307, 1308 (Ind. Ct. App. 1987), *trans. denied*); *see also D.G.*, 182 N.E.3d at 251.

[25] Petitioners maintain that Father could have sent money to Mother for the support of Child without violating the no contact orders, “as providing payments would not require communication with Mother.” *Appellant’s Brief* at 13. On the facts before us, we disagree.

[26] Father could not have mailed a check to Mother or sent payment to her by other means such as PayPal, or even through her parents, as that would have constituted direct or indirect communication with Mother, which was precluded under the no contact orders. That Mother testified she would have accepted child support if offered, does not mean that Father knew it would have not subjected him to prosecution in some fashion for violating the order. Father filed the paternity action, albeit more than a year after he last provided support for Child, and requested that support and parenting time be determined; however, as of the time of the adoption hearing, no hearing had been held in the paternity action and no support docket had been created for Father to submit child support.

[27] Petitioners highlight that “[t]here is no exception . . . in the statute for failure to provide for the care and support of a child due to a No Contact Order” and urge that the legislature surely would not have intended “for a parent who attempted to strangle the other parent, and had a No Contact Order issued against them, [to] be alleviated from having to pay for the care and support of their child.” *Id.* We find that this argument stretches our decision beyond its parameters. To be clear, we do not suggest that every non-custodial parent who has a no contact order in place against him or her is thereby relieved of paying

child support. Rather, we hold that the trial court did not clearly err when, after considering the totality of the circumstances, it determined that Petitioners did not establish, by clear and convincing evidence, that Father failed to pay support when able to do so.

[28] For all foregoing reasons, we cannot say in this case that the evidence leads to but one conclusion and the trial court reached the opposite conclusion. Accordingly, we affirm the trial court's decision that Father's consent was required for the adoption of Child.

[29] Judgment affirmed.

Brown, J. and Tavitas, J., concur.