

MEMORANDUM DECISION

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IN THE COURT OF APPEALS OF INDIANA

W.O.,
Appellant,

v.

M.D.,
Appellee

October 27, 2021

Court of Appeals Case No.
21A-AD-774

Appeal from the Monroe Circuit
Court

The Honorable Stephen R. Galvin,
Judge

Trial Court Cause No.
53C07-2001-AD-000008

May, Judge.

[1] W.O. (“Father”) appeals the adoption of his daughter, D.M.-O. (“Child”) by M.D. (“Stepfather”). Father presents multiple issues for our review, which we consolidate and restate as:

1. Whether the trial court abused its discretion when it denied Father’s motion to continue;
2. Whether the trial court erred when it determined Father’s consent to Child’s adoption was not necessary; and
3. Whether the trial court erred when it determined Child’s adoption by Stepfather was in Child’s best interests.

We affirm.

Facts and Procedural History

- [2] Child was born to S.M. (“Mother”) on November 2, 2015. Father filed a paternity affidavit indicating he was Child’s father at the time of Child’s birth. However, the parties have not legally established paternity of Child, and there is not a child support or parenting time order in place. For the first two years of Child’s life, Father visited with Child regularly, including overnight visits.
- [3] In October 2017, Father was arrested¹ because he “was drunk and threw a rock and hit a cop car.” (Tr. Vol. II at 106.) Because of that incident and Mother’s

¹ Father could not remember if charges were filed against him based on this incident.

concern that Father was not maintaining a safe living environment for Child, Mother allowed Father to visit with Child only during the day from February 2018 until March 24, 2018. On March 17, 2018, Father lost his job at the Bloomington Country Club because he was observed drinking on the job. Father went on vacation, returned briefly to Bloomington, and moved to Nashville, Tennessee, on March 24, 2018.

[4] After moving to Nashville, Father was employed by at least two restaurants, and his tax returns indicated he earned \$37,958 and \$47,938 in 2018 and 2019, respectively. Father did not pay child support during this time, and when asked if he would pay child support, Father told Mother, “[C]hild support will have to be figured out by the courts so that it is on paper and so that my visitation rights are enforced.” (Ex. Vol. 1 at 229.) Father also told Mother, “You will not get a dime out of me until I have visitation rights.” (*Id.* at 230.) Father saw Child once in April 2018 and once in June 2018.

[5] On February 6, 2019, Father visited with Child for “three (3) or four (4) hours” at a mutual friend’s house. (Tr. Vol. II at 42-3.) On April 22, 2019, Father emailed Mother to ask to schedule a visit with Child. Mother agreed and asked Father to give her available dates. On May 4, 2019, Father responded that he would send Mother his schedule “ASAP.” (Ex. Vol. 1 at 16.) Father did not send Mother his schedule as promised. Additionally, Father traveled to Bloomington, where Child lives, several times in 2019 to see a woman he was dating. Father did not contact Mother to arrange visits with Child during these times.

- [6] Mother and Stepfather have been married since June 2018, and Stepfather has been living with Mother and Child since Child was four months old. Mother and Stepfather have one child together, and Stepfather has one older child. On January 30, 2020, Stepfather filed a petition to adopt Child. Mother consented to Stepfather's adoption of Child.
- [7] On March 3, 2020, Father filed correspondence with the trial court contesting the adoption and requesting the appointment of counsel. On July 21, 2020, the trial court appointed counsel for Father. On August 14, 2020, Father filed a motion to contest Child's adoption by Stepfather. On October 6, 2020, the trial court held a hearing on the matter and determined it needed more information about Child's best interests. The trial court appointed a Guardian ad litem to investigate and submit a report to the trial court regarding whether adoption was in Child's best interests, and it set a final hearing for December 15, 2020.
- [8] On November 18, 2020, the Guardian ad litem filed a motion to continue asking for more time to "complete his investigation, obtain documents, and prepare his written report[.]" (App. Vol. III at 57.) The trial court granted the continuance and rescheduled the final hearing for February 11, 2021. On February 3, 2021, the Guardian ad litem filed his report. On February 8, 2021, Father filed a motion to continue in which he argued:

1. Guardian ad litem Aaron McCrea (the "GAL") submitted his Report on February 3, 2021. In his Report, the GAL stated that what is in [Child's] best interests at this time is not clear. The GAL recommended that the conclusion of the final hearing be continued for approximately six months and that Father

immediately undergo a drug and alcohol assessment and mental health evaluation and follow all of providers' recommendations.

2. The GAL recommended that upon completion of this assessment and evaluation, Father have therapeutically supervised parenting time at his expense, with Mother participating as recommended by the supervising agency.

3. Father welcomes the opportunity to comply with the GAL's recommendations and to again be an active parent to [Child]. He has begun contacting mental health providers to schedule the recommended evaluations.

(*Id.* at 70.) The trial court denied Father's motion to continue and held the final hearing on February 11, 2021. Father and his counsel were present at that hearing. On March 30, 2021, after concluding Father's consent was not required for Stepfather's adoption of Child and Stepfather's adoption of Child was in Child's best interests, the trial court granted Stepfather's petition to adopt.

Discussion and Decision

1. Motion to Continue

[9] The decision to grant or deny a continuance rests within the sound discretion of the juvenile court. *Rowlett v. Vanderburgh Cnty. Office of Family & Children*, 841 N.E.2d 615, 619 (Ind. Ct. App. 2006), *trans. denied*. We will reverse the court's decision only for an abuse of that discretion. *Id.* An abuse of discretion occurs when the party requesting the continuance has shown good cause for granting

the motion, but the juvenile court denies it. *Id.* No abuse of discretion will be found when the moving party is not prejudiced by the denial of its motion. *Id.* We also “consider whether the record demonstrates dilatory tactics on the part of the movant designed to delay coming to trial.” *J.P. v. G.M.*, 14 N.E.3d 786, 790 (Ind. Ct. App. 2014).

[10] Father argues he demonstrated good cause for a continuance, specifically that he was pursuing mental health and substance abuse treatment, and thus the trial court abused its discretion when it denied his motion to continue. However, by the time Father filed his motion to continue, the adoption petition had been pending for over a year. Father’s mental health and substance abuse issues were not new, and he has not indicated he was unable to engage in mental health or substance abuse treatment during that year, or in prior years.

[11] Father was not prejudiced by the denial of his motion for a continuance because both Father and his counsel were present at the hearing on February 11, 2021. Father’s counsel presented evidence, argued on Father’s behalf, and cross-examined witnesses. Father testified during the hearing regarding his progress with mental health and substance abuse treatment, and his intention to continue that treatment. As the purpose of the February 11, 2021, hearing was to determine if adoption was in Child’s best interests and Father was present and able to present evidence, testimony, and argument regarding that issue, we cannot say the trial court abused its discretion when it denied Father’s motion to continue. *See In re E.E.*, 853 N.E.2d 1037, 1044 (Ind. Ct. App. 2006) (trial court did not abuse its discretion when it denied father’s motion to continue

because father was represented by counsel who presented evidence, argument, and cross-examined witnesses during the final hearing), *trans. denied*.

2. Necessity of Father's Consent

[12] Father next challenges the trial court's determination that his consent was not required for Stepfather to adopt. We will not disturb a decision in an adoption proceeding unless the evidence leads to but one conclusion and the trial judge reached an opposite conclusion. *In re Adoption of M.A.S.*, 815 N.E.2d 216, 218 (Ind. Ct. App. 2004). We will not reweigh the evidence. *Id.* Instead, we examine the evidence most favorable to the decision together with reasonable inferences drawn therefrom to determine whether there is sufficient evidence to sustain the decision. *Id.* The decision of the trial court is presumed correct, and it is the appellant's burden to overcome that presumption. *Id.*

[13] When, as here, the trial court sua sponte enters findings of fact and conclusions of law pursuant to Indiana Trial Rule 52(A), we apply a two-tiered standard of review. *In re Adoption of A.S.*, 912 N.E.2d 840, 851 (Ind. Ct. App. 2009), *trans. denied*. First, we determine whether the evidence supports the findings and second, whether the findings support the trial court's conclusions. *Id.* The trial court's findings or conclusions will be set aside only if they are clearly erroneous. *Id.* A finding of fact is clearly erroneous if the record lacks evidence or reasonable inferences from the evidence to support it. *Id.* Issues on which the trial court makes no findings will be reviewed as a general judgment. *C.B. v. B.W.*, 985 N.E.2d 340, 344 (Ind. Ct. App. 2013), *trans. denied*. A "general

judgment will be affirmed if it can be sustained upon any legal theory by the evidence introduced at trial.” *Id.* Father does not challenge any of the trial court’s findings, and thus they are accepted as correct. *See Madlem v. Arko*, 592 N.E.2d 686, 687 (Ind. 1992) (unchallenged findings “must be accepted as correct”). Father’s contention is that the findings do not support the judgment.

[14] Generally, courts may not grant a petition for adoption without the consent of the child’s biological parents. Ind. Code § 31-19-9-1(a). However, Indiana Code section 31-19-9-8(a) provides, in relevant part:

(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.

Furthermore, subsection (a) is written in the disjunctive “such that the existence of any one of the circumstances provides sufficient ground to dispense with consent.” *In re Adoption of O.R.*, 16 N.E.3d 965, 973 (Ind. 2014). Father argues the trial court erred when it determined his consent was not necessary for

Child's adoption because Mother prevented him from communicating with Child and he provided care and support for Child.

[15] “Indiana law imposes a duty upon a parent to support his children. This duty exists apart from any court order or statute.” *In re Adoption of M.A.S.*, 815 N.E.2d at 220. When considering whether a parent has knowingly failed to support a child for one year, we note “the relevant time period 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.” *In re Adoption of J.T.A.*, 988 N.E.2d 1250, 1255 (Ind. Ct. App. 2013), *reh’g denied, trans. denied*. A parent’s ability to pay support cannot be shown by “proof of income standing alone.” *In re Adoption of M.A.S.*, 815 N.E.2d at 221. “To determine that ability, it is necessary to consider the totality of the circumstances.” *Id.*

[16] Regarding Father’s failure to pay child support despite the ability to pay for at least a year prior to the filing of the adoption petition, the trial court found:

12. [Father] earned \$37,958 in 2018 and \$47,938 in 2019. [Father] provided no support for [Child] in either year. He admits that he was capable of paying child support. He admits that he has provided nothing for [Child] since April, 2018.

13. [Father] testified that he was not able to contact [Mother] because he lost access to [Mother’s] email due to change in employment in mid-December, 2019. He also testified that he did not pay child support during 2018 and 2019 because he did not know how to locate [Mother]. This testimony is obviously not truthful.

14. When asked why he did not provide support or establish contact with [Mother] through his mother, [Father] testified that he did not know how to contact [Mother] directly and he refused to use his mother as a conduit. This testimony is also untruthful.

* * * * *

18. [Father] returned to Bloomington to live in January, 2020. He was employed as the general manager at The Standard Grain restaurant with a biweekly gross income of \$1400. He quit this job on February 17, 2020, citing a disagreement about the operation of the restaurant as the reason. He was subsequently employed at La Una Cantina as the bar manager overseeing all bar operations. He quit this job in April, 2020, citing a difference of opinion with the chef.

19. [Father] is currently working for a friend on a food truck. He is earning \$10 per hour. [Father] testified that he has applied for over 200 jobs and was recently offered a position as a general manager in Indianapolis with a starting salary of \$55,000-\$60,000. He testified that this was not enough money and he turned down the job. He testified that he may have to leave Bloomington to obtain employment.

* * * * *

22. [Father] testified that he intends to file an action to establish parenting time and to establish child support. However, he has not yet filed such an action.

23. [Father's] mother, Janice Gillie, has maintained regular contact with [Mother] and [Child]. She visits with [Child] regularly and has had overnights with [Child]. Ms. Gillie has

always known how to contact [Mother]. Ms. Gillie testified that [Father] did not ask for her help in seeing [Child]. He did not ask her to take money to [Mother] for [Child's] care.

(App. Vol. III at 76-8.) Father contends that he did not provide support for Child because Mother did not allow him to see Child and he did not know how to contact Mother. Those arguments are invitations for us to reweigh the evidence and judge the credibility of witnesses, which we cannot do. *See In re Adoption of M.A.S.*, 815 N.E.2d at 218 (appellate court cannot reweigh evidence or judge the credibility of witnesses). Therefore, we hold the trial court's findings support its conclusion that Father's consent was not required for Child's adoption because Father failed to support Child for at least one year prior to the filing of the adoption petition, despite having the ability to do so. *See Irvin v. Hood*, 712 NE.2d 1012, 1014 (Ind. Ct. App. 1999) (father's consent to child's adoption not necessary when father failed to provide support for child and had the ability to do so for at least one year prior to the filing of the adoption petition).

3. Child's Best Interests

[17] “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). Even if the trial court determines a parent's consent is not required for adoption, the court still must decide if adoption is in the child's best interests. *Id.* While the adoption statutes do not provide guidance regarding the factors a court is to consider when determining the best interests of the child,

we have noted that there are strong similarities between the adoption statute and the termination of parental rights statute in this respect. See *In re Adoption of M.L.*, 973 N.E.2d 1216, 1224 (Ind. Ct. App. 2012) (holding that the adoption statutes and the termination statutes provide similar balances between parental rights and the best interests of the children; also holding that termination cases provide “useful guidance as to what makes a parent ‘unfit’”). In termination cases, we have held that the trial court is required to look to the totality of the evidence to determine the best interests of a child. *In re I.A.*, 903 N.E.2d 146, 155 (Ind. Ct. App. 2009). Relevant factors include, among others, a parent’s historical and current inability to provide a suitable environment for the child, *In re J.C.*, 994 N.E.2d 278, 290 (Ind. Ct. App. 2013)[, *reh’g denied*]; the recommendations of the child’s case worker or guardian ad litem; and the child’s need for permanence and stability, see *A.J. v. Marion Cnty. Office of Family and Children*, 881 N.E.2d 706, 718 (Ind. Ct. App. 2008)[, *trans. denied*].

Id. at 1281-2. Father contends the trial court erred when it determined adoption was in Child’s best interests because he shares a bond with Child and “[t]here is no compelling reason why Father’s rights should be terminated at a time when he is addressing his [mental health and substance abuse] issues.” (Father’s Br. at 21.)

[18] Regarding Child’s best interests, the trial court found:

4. In October, 2017, [Father] was arrested. He testified that he was drunk, threw a rock, and hit a cop car. [Father] testified that he has a history of abusing alcohol. His criminal history includes multiple convictions for DUI, the most recent in 2010.

5. From February, 2018, to March 24, 2018, [Father], at the insistence of [Mother] only visited [Child] during the day. [Mother] testified that [Father] agreed to move to daytime visits. [Mother] testified that there was a constant lack of communication with [Father]. There were problems between [Father] and his girlfriend. [Mother] believed that [Father's] conduct posed safety concerns for [Child]. The court accepts this testimony as accurate.

* * * * *

10. On December 4, 2018, [Father] sent an email to [Mother] asking that they come to an agreement so that he could see [Child] on a regular basis. After an exchange of emails, a visit was arranged. [Father] saw [Child] for 3 to 4 hours on February 6, 2019. This was the last time [Father] saw [Child].

11. [Father] sent an email to [Mother] on April 22, 2019, asking to see [Child]. [Mother] responded that they were busy on weekends during the month of May and that she would give him a heads up regarding [Child's] availability. [Father] responded on May 4, 2019, stating that he would get back to [Mother] to schedule a time to see [Child] in early summer. After this email, all communications between [Father] and [Mother] ceased.

* * * * *

15. [Father] visited [his girlfriend] in Bloomington several times in the second half of 2019. He made no attempt to contact [Mother] or to see [Child] during these visits to Bloomington.

* * * * *

17. [Father] saw a therapist for depression and anxiety. He was diagnosed with major depression. He did not receive treatment for his alcohol addiction. This treatment was short-lived. He saw this therapist twice.

* * * * *

20. [Father] testified that he has an alcohol addiction problem. He has participated in substance abuse treatment several times in the past.

21. [Father] has not recently participated in substance abuse treatment. He testified that a nurse practitioner has provided him with prescriptions to address depression and panic attacks. He is on a waitlist for an evaluation by Lindeman and Associates. He admits that addictions treatment is available at Centerstone, the local mental health center, or at Amethyst House. [Father] testified that he called Centerstone and left a message. He has taken no other action to obtain treatment. He has not called Amethyst House.

* * * * *

24. [Stepfather] began living with [Mother] and [Child] when [Child] was four months old. [H.D.] was born to [Mother] and [Stepfather] on May 27, 2017. [Mother] and [Stepfather] were married on June 8, 2018.

25. [E.], [Stepfather's] 17-year-old son, also resides in the home with [Stepfather], [Mother], [Child], and [H.D.].

26. Like [Father], [Stepfather] and [Mother] have significant histories of alcohol abuse. Both have multiple convictions for DUI. [Stepfather] was arrested and convicted for DUI

approximately 3 ½ years ago. He spent 10 days in jail. He engaged in substance abuse treatment with Joni Reagan, a local therapist, and successfully completed his treatment. He was discharged from probation in April, 2019. However, by his own admission, he continues to drink alcohol and use marijuana periodically.

27. [Mother] was arrested for DUI in 2019. [Mother] began attending outpatient group therapy in February, 2019, and successfully completed the program on August 31, 2020. She has continued to attend group therapy once per week for recovery support. She regularly attends AA meetings. [Mother] is engaged in treatment with Joni Reagan. Ms. Reagan reports that [Mother] has made tremendous progress and is consistently working on her addiction. [Mother] successfully completed her probation on September 24, 2020.

28. Ms. Reagan told the Guardian ad litem that [Stepfather] and [Mother] are engaged parents who are raising happy children. Ms. Reagan has no concerns about their ability to parent their children.

29. As [Mother] testified, [Stepfather] brings stability for [Child]. He loves [Child]. He sees her as his daughter. He exercises day-to-day responsibilities for her care. He gets her up in the morning and makes breakfast for her. [Stepfather] wants to adopt [Child] because he believes it is in her best interest.

30. [Stepfather] is employed by Value Built Construction, earning approximately \$48,000 per year. [Stepfather] has provided support for [Child] throughout her life.

(App. Vol. III at 76-8.) Father has had all of Child's life to address his substance abuse and mental health problems, and he has only haphazardly

done so in the months leading up to Child's adoption. Father's arguments regarding the significance of his recent pursuit of mental health and substance abuse treatment and his bond with Child are invitations for us to reweigh the evidence and judge the credibility of the witnesses, which we cannot do. *See In re Adoption of M.A.S.*, 815 N.E.2d at 218 (appellate court cannot reweigh evidence or judge the credibility of witnesses). Therefore, we hold the trial court did not err when it concluded that adoption was in Child's best interest. *See In re Adoption of M.L.*, 973 N.E.2d 1216, 1224 (Ind. Ct. App. 2012) (father's historical inability to communicate with and support child, coupled with the child's stable living environment with adoptive parents supports the trial court's conclusion that adoption was in child's best interests).

Conclusion

[19] The trial court did not abuse its discretion when it denied Father's motion to continue because Father has not demonstrated he was prejudiced by the denial. Further, the trial court did not err when it concluded Father's consent was not necessary and adoption was in Child's best interests. Accordingly, we affirm the judgment of the trial court, which granted Stepfather's petition to adopt Child.

[20] Affirmed.

Vaidik, J., and Molter, J., concur.