

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.



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IN THE COURT OF APPEALS OF INDIANA

In the Matter of the Adoption of
S.N., Minor Child,

M.O.,
Appellant-Petitioner,

v.

B.N.,
Appellee-Respondent,

and

June 9, 2021

Court of Appeals Case No.
20A-AD-2055

Appeal from the
Marion Superior Court

The Honorable
Steven R. Eichholtz, Judge

Trial Court Cause No.
49D08-2001-AD-2992

M.B.,¹

Intervenor.

Kirsch, Judge.

- [1] M.O. (“Step-Father”) appeals the trial court’s order requiring the consent of B.N. (“Father”) for the adoption of S.N. (“Child”). Step-Father raises two issues, one of which we find dispositive: whether the trial court erred when it determined that Father’s consent was required for the adoption to proceed.
- [2] We reverse and remand.²

Facts and Procedural History

- [3] Father, who executed a paternity affidavit, and T.H. (“Mother”) are the biological parents of S.N., who was born on November 2, 2016. *Appellant’s App. Vol. 2* at 11, 14-15. Father lived together with Mother for approximately six months until he moved out in January 2017. *Tr. Vol. II* at 9. Step-Father

¹ Although M.B. is not participating in this appeal, under Indiana Appellate Rule 17(A), a party of record in the trial court shall be a party on appeal.

² Because Father’s consent was not necessary for the adoption to proceed, we need not address Step-Father’s argument regarding the failure to appoint a guardian ad litem.

began dating Mother in April 2017 and had known Child since she was five months old. *Id.* at 44. Step-Father moved in with Mother around the end of May 2017. *Id.* at 44-45.

[4] On July 13, 2017, Mother filed a “Verified Petition To Establish Paternity, For Supervised Parenting Time, Child Support, and Request For Guardian Ad Litem” under Cause Number 49C01-1707-JP-27235 (“the circuit court paternity action”) in the Marion Circuit Court, requesting that the trial court enter an order establishing paternity and child support, appointing a guardian ad litem to prepare a written report, and ensuring that Father’s parenting time be supervised. *Appellant’s App. Vol. 2* at 11-13. On August 23, 2017, the trial court entered an order (“the August 23, 2017 order”) on Mother’s petition in the circuit court paternity action, in which, among other things, Mother received sole legal and physical custody of Child, and Father was given parenting time with Child from 8:00 a.m. until 6:00 p.m. every Wednesday and Saturday, would not consume alcohol or use illegal drugs within twenty-four hours before his parenting time or during his parenting time with Child, and because he did not have a valid driver’s license at the time, would arrange to pick up Child with a responsible, licensed adult driver. *Id.* at 16-17. Father was also ordered to pay \$45.00 per week in child support. *Id.* at 17.

[5] On May 21, 2018, Mother filed a “Verified Petition For Supervised Parenting Time And Verified Petition For Rule To Show Cause” in the circuit court paternity action, in which she sought a modification of the parenting time order and asserted that Father’s parenting time needed to be supervised by a

supervising agency due to Father's charge of felony possession of methamphetamine and synthetic identity deception in Shelby County, expressed concerns over Father's drug abuse, including that Father was "high all the time [] and totally strung out," and that because of those concerns, Mother stopped allowing parenting time with Child in April 2018. *Id.* at 20-21. In her rule to show cause, Mother also alleged that she had not received any child support from Father in more than ninety days. *Id.* at 21.

[6] In the meantime, Mother and Step-Father were married on August 26, 2018. *Id.* at 33, 39; *Tr. Vol. II* at 44. Father began his incarceration on January 10, 2019. *Tr. Vol. II* at 57. The trial court held the hearing on Mother's petition for supervised parenting time and rule to show cause on January 18, 2019. *Appellant's App. Vol. 2* at 24. Father, who was in custody, attended the hearing, and the trial court took the matter under advisement. *Id.* On February 1, 2019, the trial court issued an order ("the February 1, 2019 order") on Mother's petition for supervised parenting time and rule to show cause, ruling that a modification of Child's parenting time with Father was in Child's best interests and holding Father in indirect contempt for failure to pay child support.³ *Id.* at 28, 30.

³ The trial court's February 1, 2019 order found that Father had a warrant in Shelby County for his arrest because he missed his sentencing date in his felony possession of methamphetamine and synthetic identity deception case. *Appellant's App. Vol. 2* at 27. It also found that Father had a criminal case pending in Shelby County for Level 6 felony cheating on a gambling game, a criminal case pending in Marion County for Level 2 felony dealing in methamphetamine and Level 3 felony possession of methamphetamine, and another criminal case pending in Marion County for Class C misdemeanor possession of paraphernalia. *Id.*

[7] As to the modification of Father's parenting time, the trial court found that since the August 23, 2017 order Father had "not exercised consistent parenting time per [the August 23, 2017 order]," that he "was seeing the Child about once a month at Mother's residence, but not every month," that there "were big chunks of time where Father was not around," but that Father saw Child at Christmas. *Id.* at 26. In modifying Father's parenting time and requiring that it occur at a supervising agency, the trial court specifically observed: "Based on a careful consideration of the evidence, the Court does find that it 'would,' not 'might,' endanger the Child's physical health and well-being and/or significantly impair the Child's emotional development for Father to exercise unrestricted parenting time." *Id.* at 28. The trial court then ordered that Father's parenting time was to be supervised by an "agreed upon third party, that is not Father's family" and, if that the parties could not come to an agreement, that Father's parenting time was to be supervised by Mending Fences, a supervised parenting time center, and that Father was not to consume alcohol or non-prescribed drugs forty-eight hours before his scheduled parenting time or during his scheduled parenting time. *Id.* at 28-29.

[8] As to Mother's rule to show cause due to Father's willful failure to pay child support, the trial court found that Mother had received two lump sum payments from Father in the amount of \$1,803.00; one payment was Father's tax check and the other was a jackpot winning of Father's that had been garnished. *Id.* at 29. It also found that Father "admitted that he has not paid his child support because his drug addiction has taken over and he has not been

working” but that Father “testified that once he is out of custody and working again, he will make his weekly child support payments.” *Id.* Based on the evidence, the trial court found Father in indirect contempt but did not sanction him; instead, it “admonishe[d] Father and order[ed] him to comply with the parties’ Final Agreed Decree and to begin making his weekly child support payments as soon as he is working again.” *Id.* at 30.

- [9] On January 9, 2020, Father filed a “Verified Petition For Modification Of Child Support” in the circuit court paternity action because he was “currently incarcerated in the Shelby County Jail, Indiana” as the basis for the modification. *Id.* at 48.⁴ On January 22, 2020, Step-Father filed his “Verified Petition For Step-Parent Adoption” (“the superior court adoption proceeding”) in the probate division of the Marion Superior Court, in which he sought to adopt Child without Father’s consent, contending that pursuant to both clauses (A) and (B) of Indiana Code section 31-19-9-8(a)(2) Father had: (1) failed without justifiable cause to communicate with Child when able to do so for at least one year; and (2) knowingly failed to provide for the care and support of Child when able to do so as required by law or judicial decree. *Id.* at 33, 39. Step-Father also contended that Father’s consent was unnecessary pursuant to Indiana Code section 31-19-9-8(a)(11) because Father was an unfit parent, and

⁴ On February 5, 2020 Mother filed notice of the step-parent adoption in the circuit court paternity action. *Appellant’s App. Vol. 2* at 41. We note that Indiana Code section 31-14-21-13 provides that “[u]pon notice that a court in which an adoption is pending has assumed jurisdiction of a paternity action under IC 31-19-2-14, the court in which the paternity action was pending shall stay all proceedings in the paternity action until further order from the court in which the adoption is pending.”

it would be in Child's best interest to dispense with consent and that, pursuant to Indiana Code section 31-19-9-8(b), Child should be declared abandoned because Father had made only token efforts to support or communicate with Child. *Id.*⁵ That same day Mother, filed her acknowledgment of and consent to Step-Father's adoption petition. *Id.* at 36.

[10] On February 11, 2020, Father filed his objection to Step-Father's adoption petition and denied that he had failed to communicate and failed to support Child, that he was not an unfit parent, and that he had not abandoned Child by making only token efforts to support or communicate with Child. *Id.* at 43-44. On February 19, 2020, Step-Father filed his petition to waive the home study requirement. *Id.* at 79.⁶ On February 24, 2020, M.B., Father's mother, ("Paternal Grandmother") filed a motion to intervene in the superior court adoption proceeding, and the trial court granted Paternal Grandmother's motion on February 25, 2020. *Id.* at 81-83.

[11] On June 4, 2020 Father filed a "Motion to Enforce Court-Ordered Parenting Time" in the superior court adoption proceeding, which the trial court denied on June 8, 2020 with the notation that "*Parenting Time order is not under

⁵ The January 22, 2020 adoption petition did not state the location of Mother and Step-Father's August 26, 2018 marriage, and a corrected adoption petition including the location, Brown County, Indiana, was filed on January 29, 2020. *Appellant's App. Vol. 2* at 3, 38-40.

⁶ Also, on February 19, 2020, Step-Father filed his criminal history check showing that he was qualified to adopt, verification by the Indiana Department of Child Services that he had no record of substantiated abuse or neglect in Indiana and that he was not listed on the sex offender registry, and his putative father registry affidavit. *Appellant's App. Vol. 2* at 56-71.

Adoption cause number and therefore not under Probate Court’s jurisdiction to enforce. Any request to modify parenting time must be done under proper cause.” *Appellant’s App. Vol. 2* at 72-73, 75. On June 9, 2020, Father filed a substantially identical “Motion to Enforce Court-Ordered Parenting Time” in the circuit court paternity action, and on June 15, 2020, the circuit court noted “Per statute, this matter cannot be heard by the JP court and must be consolidated with the pending adoption. The Court orders this matter consolidated with [the superior court adoption proceeding].” *Id.* at 52-55.⁷ On June 22, 2020, Father again filed a “Motion to Enforce Court-Ordered Parenting Time” under the superior court adoption proceeding. *Id.* at 76-78. That same day, the trial court made an entry in the CCS stating that “[a]ny objections or responses to Father’s Motion To Enforce Parenting Time must be filed by 7/7/2020 or the Court will rule on the motion without a hearing.” *Id.* at 6.

[12] On July 6, 2020, Step-Father responded to Father’s motion seeking parenting time and objected to Father’s request for parenting time while the superior adoption proceeding was pending and requested that the trial court appoint a guardian ad litem to ascertain Child’s best interests for purposes of parenting time and the pending adoption. *Id.* at 45-47. That same day, the trial court

⁷ We note that Indiana Code section 31-19-2-14(a) provides that “[i]f a petition for adoption and a paternity action are pending at the same time for a child sought to be adopted, the court in which the petition for adoption has been filed has exclusive jurisdiction over the child, and the paternity proceeding must be consolidated with the adoption proceeding.”

made an entry in the CCS that Step-Father’s “request that the Response to Father’s Motion to Enforce Parenting Time Order, and Petitioner’s Motion for Appointment of Guardian ad litem be heard at the attorney’s conference is denied.” *Id.* at 7.

[13] The trial court held a hearing on Step-Father’s adoption petition October 1, 2020. *Id.* at 8. During the hearing, Step-Father’s counsel moved to admit interrogatories, requests for production, and requests for admissions, which were served on Father and Father’s counsel on August 28, 2020. *Tr. Vol. II* at 30-31; *Appellant’s App. Vol. 2* at 101. The requests for admission and interrogatories, provided in part, that pursuant to Indiana Trial Rule 36, Father admit the truth of the following admissions within thirty days of service of the request or the following would be deemed admitted if there was no response within that time period:

1. [Father] is the biological father of [Child].
2. [Mother] is the biological mother of [Child].
3. [Father] and Mother entered into a Final Agreed Decree of Paternity that was approved by the Court on August 23, 2017.
4. Pursuant to the Final Agreed Decree of Paternity, [Father] is required to pay Mother \$45 each week for support for [Child].
5. [Father] has never made a weekly child support payment.

6. [Father] has never voluntarily provided any financial support for [Child].

7. [Father] has had multiple drug-related charges.

8. [Father] has had several drug-related convictions.

9. While incarcerated, [Father] received gifts of money to his commissary account each month.

10. While incarcerated, [Father] made no attempt to contact [Child].

11. While incarcerated, [Father] never sent [Child] any mail.

12. While incarcerated, [Father] made no attempt to speak to [Child] by telephone.

13. Prior to his incarceration, [Father] did not have regular contact with [Child].

14. At the hearing in [the circuit court paternity action] on January 18, 2019, [Father] admitted that he struggles with drug addiction.

15. At the hearing in [the circuit court paternity action] on January 18, 2019, [Father] admitted that he had not been paying any child support for [Child] because he had allowed his drug addiction to take over his life.

16. Prior to his incarceration, [Father] did not set up supervised parenting time through Mending Fences as ordered by the Paternity Court.

17. Prior to the January 18, 2019, hearing [Father] was seeing [Child] less than one time a month.

18. [Father] has failed to support [Child] for a period of more than 12 months.

19. [Father] has not had significant contact with [Child] for a period of more than 12 months.

20. At the hearing in [the circuit court paternity action] on January 18, 2019, [Father] admitted that he was not fit to have unsupervised parenting time with [Child].

21. [Father] does not have a valid driver license.

Id. at 98-99.

[14] Step-Father's attorney asked the trial court to take judicial notice of Indiana Trial Rule 36, which provides that admissions are deemed admitted if no response is served within thirty days of the request. *Tr. Vol. II* at 31. Father's attorney first asked the trial court "for a little mercy for my client and have a little grace for him. He has written his responses. They just have not made it to me. And while I was served with them on the 28th [of August], it does not necessarily mean that he was." *Id.* at 32. His attorney did not previously ask for an enlargement of time because "[t]he plan was I was supposed to have the responses on Monday from him, but I did not receive them. So, I was not going to need extra time. And then the time had already lapsed by the time that

I learned I was not going to have them on time.” *Id.*⁸ The trial court then denied Father’s attorney’s “verbal motion for an enlargement of time” because the responses were deemed admitted pursuant to after the thirty days had elapsed without a response from Father and the discovery, including the requests for admission, were admitted. *Id.* at 32-33.

[15] The trial court then reconsidered its prior ruling denying Father’s earlier verbal motion for an enlargement of time, which it was treating as a motion to withdraw, and in deeming the admissions admitted, it stated, “I do believe case law does allow a motion to be made to withdraw things, even if they have been deemed admitted by failing to answer in a timely fashion.” *Id.* at 38. Step-Father’s counsel objected to the trial court’s decision to reconsider its prior ruling on the request for admissions, arguing that the requests “specifically in preparation of today’s hearing,” and Father did not comply by responding despite the timeline and the awareness that the hearing on the adoption petition was approaching. *Id.* The trial court observed that the requests were sent at a time where “the answers would be due right before the hearing, like two days before” and granted the motion to withdraw. *Id.* at 38-39.

⁸ Father acknowledged that he had received the interrogatories, requests for production, and request for admissions but that he “could not figure out how to get my written responses to the attorney on time. Like, we were trying to do it through the phone. And my mom could not figure it out, but I have written responses to them at home. Yeah. We just could not get them to her.” *Id.* at 30-31.

[16] On October 26, 2020, the trial court issued its order concluding that Father's consent to the adoption was required, reasoning as follows:

[Step-Father] has not met his burden of proving that Father's consent to the adoption is unnecessary. Further, the Court finds that the Petitioner has not met the burden of proving the requirements of [Indiana Code section 31-19-9-8(a)(11)] are satisfied by clear and convincing evidence nor that the best interests of the child are served if the court dispenses with Father's consent to the adoption.

Appellant's App. Vol. 2 at 10. Step-Father now appeals.

Discussion and Decision

[17] We begin by noting that Father has not filed an appellee's brief. When an appellee fails to file a brief, we need not undertake the burden of developing an argument on appellee's behalf. *C.V. v. C.R.*, 64 N.E.3d 850, 852 (Ind. Ct. App. 2016). Instead, applying a less stringent standard of review, we may reverse the trial court's judgment if the appellant can prove a case of *prima facie* error. *Id.* "Prima facie error in this context is defined as, 'at first sight, on first appearance, or on the face of it.'" *Trinity Homes, LLC v. Fang*, 848 N.E.2d 1065, 1068 (Ind. 2006) (quoting *Santana v. Santana*, 708 N.E.2d 886, 887 (Ind. Ct. App. 1999)).

[18] When reviewing a trial court's ruling in an adoption case, the appellant bears the burden of overcoming the presumption that the trial court's decision is correct. *In re Adoption of S.W.*, 979 N.E.2d 633, 639 (Ind. Ct. App. 2012) (citing *In re Adoption of A.S.*, 912 N.E.2d 840, 851 (Ind. Ct. App. 2009), *trans. denied*).

We will neither reweigh the evidence nor 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. *Id.* We will not disturb the trial court's ruling unless the evidence leads to only one conclusion and the trial court reached an opposite conclusion. *Id.*

[19] Step-Father argues that the trial court erred when it determined that Father's consent was necessary for his adoption of Child to proceed because he contends he carried his burden under Indiana Code section 31-19-9-8(a)(2).⁹ Indiana Code section 31-19-9-1(a) provides in part that, "[e]xcept as otherwise provided in this chapter, a petition to adopt . . . may be granted only if written consent to adoption has been executed" by "(2) The mother of a child born out of wedlock and the father of a child whose paternity has been established by . . . (B) a paternity affidavit executed under IC 16-37-2-2.1. . . ." However, Indiana Code section 31-19-8(a)(2) provides, in part that:

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

⁹ Step-Father advances no argument on the basis of Indiana Code section 31-19-9-8(a)(11).

(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.

Ind. Code § 31-19-9-8(a)(2). This particular subdivision 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).

[20] Step-Father argues that pursuant to Indiana Trial Rule 36 the trial court abused its discretion in ruling that his request for admissions – which showed that for at least one year Father failed to both maintain contact with Child and to support Child – were properly withdrawn because the trial court did not make the necessary findings. He also argues that the evidence before the trial court showed that for at least one-year Father had both failed to communicate significantly and failed to support Child pursuant to Indiana Code section 31-19-9-8(a)(2).

[21] It is without dispute that Father did not timely respond to the request for admissions. Thus, pursuant to Indiana Trial Rule 36, the matters covered by the request for admissions were deemed admitted and conclusively established by operation of law. Ind. Trial Rule 36(A). Once the admissions are obtained, the need to prove those facts at trial are eliminated, and the trial court may not disregard the admissions. *Corby v. Swank*, 670 N.E.2d 1322, 1324 (Ind. Ct. App. 1996). Further, the party obtaining the admissions is under no obligation to move to have them deemed established. *Id.*

[22] However, Indiana Trial Rule 36(B) governs the withdrawal of admissions and provides in part:

Any matter admitted under this rule is conclusively established unless the court on motion permits withdrawal or amendment of the admission. Subject to the provisions of Rule 16 governing amendment of a pre-trial order, the court may permit withdrawal or amendment when the presentation of the merits of the action will be subserved thereby and the party who obtained the admission fails to satisfy the court that withdrawal or amendment will prejudice him in maintaining his action or defense on the merits. . . .

The party seeking withdrawal has the burden of establishing that the presentation of the merits will be subserved by withdrawal, and the party who has obtained the admissions has the burden of demonstrating that it will be prejudiced if the trial court permits withdrawal. *Cross v. Cross*, 891 N.E.2d 635, 639-40 (Ind. Ct. App. 2008). When a trial court makes a finding that both conditions have been satisfied, it may, in its discretion, permit withdrawal. *Id.* at 640. The two-part test for determining if withdrawal is appropriate under the circumstances is not self-executing. *Corby*, 670 N.E.2d at 1327. Rather, “the party who has been deemed to have admitted whatever was requested has the burden of making a motion for withdrawal.” *Id.* When ruling on a motion to withdraw admissions, the trial court exercises discretion, and we will reverse only for an abuse of that discretion.” *Costello v. Zavodnik*, 55 N.E.3d 348, 352 (Ind. Ct. App. 2016).

[23] Here, the trial court's ruling does not include any findings on whether allowing Father's admissions to be withdrawn would subserve the merits and whether Step-Father would be prejudiced if they were allowed to be withdrawn. The record seems to imply that the trial court, in its act of reconsidering its prior ruling on the request for admissions, thought that doing so would serve the merits. However, the trial court's ruling does not address the prejudice as required under Trial Rule 36(B) to Step-Father, who had sent and prepared those requests "specifically in preparation of today's hearing." *Tr. Vol. II* at 38. Because the trial court did not make the required findings, Step-Father has made a prima facie showing that the trial court abused its discretion in allowing the admissions to be withdrawn. *See In re Marriage of Perez*, 7 N.E.3d 1009, 1011 (Ind. Ct. App. 2014) ("The failure to respond in a timely manner to a request for admissions causes those matters to be admitted and conclusively established by operation of law." (citing *Corby*, 670 N.E.2d at 1324)).

[24] As set forth above, the admissions included that Father had not attempted to maintain substantial contact with Child before or during his incarceration nor had he ever voluntarily made a weekly child support payment. *Appellant's App. Vol. 2* at 98-99. The admissions also specified that for at least one-year Father had not had regular or significant contact with Child and that he had failed to support Child. *Id.* Standing alone, Father's admissions support the conclusions that he both failed to communicate and failed to support Child for at least one year. In addition to the admissions, Step-Father has also shown prima facie error because the record amply supported Father's failure to communicate

significantly and failure to support¹⁰ Child for at least one year. The “period of at least one (1) year” described in Indiana Code section 31-19-9-8(a)(2) refers to *any* year not just the year preceding the adoption petition. *See In re Adoption of J.T.A.*, 988 N.E.2d 1250, 1255 (Ind. Ct. App. 2013).

[25] Here, the record showed that Father had failed to communicate significantly with Child for at least one year. Even before his incarceration, which spanned from January 10, 2019 through May 1, 2020, Father’s contact with Child was sporadic. *Tr. Vol. II* at 54, 57. For example, from January 2017 until the August 23, 2017 order in the circuit court paternity action, Father “did not follow through” with his court-ordered parenting time and instead “always showed up late” and would often ask “[Step-Father] to drop [Child] off because he had no vehicle or no way to come [] get [Child].” *Id.* at 10. After the issuance of the August 23, 2017 order, Father exercised his parenting time “[v]ery few times” and “would come every once in a while” but “would always come late – probably after 12 PM every time – if he did show up.” *Id.* at 12. The earlier finding in the February 1, 2019 order that, since the August 23, 2017 order, Father had “not exercised consistent parenting time” and was “seeing the Child about once a month at Mother’s residence, but not every month. There

¹⁰ While we address only the failure to communicate, we note briefly that Father also admitted that he had not provided financial support in 2017, made three involuntary payments in 2018, no payments in 2019, and made two payments in 2020 *after* the adoption petition had been filed. *See Tr. Vol. II* at 40-41. In contrast, Step-Father had provided financial support for Child since he moved in with Mother in May of 2017, which in addition to providing for daily necessities, included assistance with payments for Child’s gymnastics and swim classes, and had obtained life insurance and health insurance for Child. *Id.* at 46.

were big chunks of time where Father was not around. Father did see the Child at Christmas” showed that Father was not actively involved in Child’s life for a protracted period of time. *Appellant’s App. Vol. 2* at 26. Father’s contact with Child was sporadic before his incarceration, and his limited contacts preceded his incarceration. Step-Father is “the only father that Child knows” and had been a constant in her life since she was five months old, and the two have a “great relationship.” *Tr. Vol. II* at 23, 44-45.

[26] The last time that Father visited with Child before his incarceration was January 1, 2019. *Id.* at 14. “Individuals who pursue criminal activity run the risk of being denied the opportunity to develop positive and meaningful relationships with their children.” *K.T.K. v. Ind. Dep’t of Child Servs., Dearborn Cnty. Offic.*, 989 N.E.2d 1225, 1235-36 (Ind. 2013). Father acknowledged that he had taken himself “out of [Child’s] life” because of his incarceration and “lifestyle choices,” which included prior drug use, and “support[ed] everything [Step-Father] does for [Child] one hundred percent fully.” *Id.* at 51. The significance of communication is a contextual determination, and Father’s lack of communication with Child must be viewed in the context of his incarceration. *See E.B.F. v. D.F.*, 93 N.E.3d 759, 763 (Ind. 2018); *In re Adoption of O.R.*, 16 N.E.3d at 973-75 (holding that the natural father, who was incarcerated, failed without justifiable cause to communicate significantly with his daughter, and noting that he called his daughter once, and that he did not attempt mail communication with her despite his awareness that the adoptive parents were represented by counsel and therefore he “could have initiated

contact through their counsel or the court to communicate with” her). *See also In re Adoption of E.A.*, 43 N.E.3d 592, 597-99 (Ind. Ct. App. 2015) (addressing the impact of the natural father’s incarceration in determining the significance of his communication with his child and that the evidence showed that the natural father, for a period of at least one year, failed without justifiable cause to communicate significantly with child although he was able to do so, and thus his consent to mother’s husband’s petition to adopt child was not required), *trans. denied*.

[27] Once Father became incarcerated, he testified that he sent only three letters and a birthday card to Child; however, Mother and Step-Father testified that Child received only one letter containing a drawing for Child and that it was addressed to Mother and not to Child. *Id.* at 15, 45, 53. Father had Mother’s telephone number¹¹ and her address but did not call Child on the telephone while he was incarcerated. *Id.* at 15, 45. Here, Father’s involvement in Child’s life was sporadic and not significant before his incarceration. The record showed that Father’s minimal contact and communication with Child during his incarceration was a continuation of his long-term pattern of failing to communicate significantly with Child without justifiable cause when able to do so even before his incarceration. Accordingly, Step-Father has shown prima facie error because “the evidence [led] to only one conclusion” – that Father’s

¹¹ Father testified that Mother’s phone number changed and he did not receive the new number until “seven or eight months later” and he then called that number “regularly,” but there were no records of any phone calls Father made to Mother’s number while he was incarcerated. *Tr. Vol. II* at 35-36.

consent to the adoption was not required – and instead “the trial court reached [the] opposite conclusion” in erroneously determining that Father’s consent was required for the adoption to proceed. *In re Adoption of S.W.*, 979 N.E.2d at 639.

[28] Reversed and remanded.

Altice, J., and Weissmann, J., concur.