

MEMORANDUM DECISION

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IN THE COURT OF APPEALS OF INDIANA

In re the Adoption of N.A.D.,
Minor Child

C.H.,
Appellant-Respondent,

v.

E.R.,
Appellee-Petitioner.

July 14, 2022

Court of Appeals Case No.
22A-AD-241

Appeal from the Clark Circuit
Court

The Honorable Bradley B. Jacobs,
Judge

The Honorable William A.
Dawkins, Magistrate

Trial Court Cause No.
10C02-2104-AD-22

Altice, Judge.

Case Summary

[1] C.H. (Mother) appeals the trial court's decree granting E.R.'s (Stepmother) petition to adopt N.A.D. (Child). Mother raises several issues that we consolidate and restate as:

I. Did the trial court clearly err when it determined that Mother failed to communicate significantly with Child for a period of at least one year and, therefore, her consent was not necessary?

II. Did the trial court clearly err when it determined that adoption was in Child's best interests?

[2] We affirm.

Facts & Procedural History

[3] Child was born in November 2010 to Mother and D.R. (Father) in Florida. Mother and Father were not married, and Child began living with Father in April 2011. In January 2012, Father's paternity was established by a Florida court. In the decree, Father was granted sole custody of Child, and the parties agreed that "it is in the best interest of the minor child that the Mother not be awarded any time-sharing with the minor child, unless otherwise agreed to by the Father." *Appellant's Appendix Vol. II* at 4. The court did not order Mother to pay any child support, "as she has no means of income, is unemployed and

currently incarcerated.”¹ *Id.* at 4, 5. The Florida court order was never modified.

[4] In November 2012, Father and Child moved from Florida to Indiana. Mother traveled to Indiana with them, staying with them for about one week to assist with caring for Child as Father settled into their new residence. This was the last time Mother had an in-person visit with Child.

[5] In December 2012, Mother moved to Pennsylvania because her ex-husband, D.H., with whom Mother has three children, planned to move there. Ultimately, D.H. and the children did not move to Pennsylvania, and Mother became depressed and relapsed into substance abuse.² At first, she abused pain pills, and in 2015 she began using heroin. Mother’s substance abuse continued from 2012 to 2016. She remained in Pennsylvania and lived with her father in 2013 and 2014. Mother recalled that, during the years that she was with her father, she called Child “a few times,” such as on his birthday and at Christmas, and sent cards on those occasions and other holidays. *Transcript* at 46.

[6] In 2015 and 2016, Mother was in an abusive relationship with a controlling boyfriend who limited her access to money and a phone, such that it affected her ability to communicate with others, including Child. In late 2016, Mother

¹ Mother was incarcerated on an unrelated domestic battery charge.

² Mother began abusing drugs at age fifteen, and received inpatient treatment at age fifteen, sixteen, and twice when she was seventeen.

ended the relationship and was able to stop her abuse of opiates with the assistance of methadone. She has remained clean since that time, other than testing positive once in 2017. Mother indicated that her attempts at communication with Child increased once she became sober.

- [7] Father and Stepmother began living together in November 2019, and they married in October 2020. Mother and Father agreed to a plan for Mother to come to Indiana to visit Child in February 2020. Ultimately, Mother canceled that trip for health reasons related to back surgery.
- [8] On April 6, 2021, Stepmother filed a Verified Petition for Stepparent Adoption, and Father filed his consent to the adoption. Mother, pro se, timely filed pleadings to contest the adoption. The Court scheduled a hearing on the issue of Mother's consent for August 4, 2021. On July 29, Mother filed a motion to continue the hearing, alleging health issues, the unavailability of a witness, and that she had not yet been able to retain legal counsel. The court denied the continuance and held the hearing on August 4, and Mother appeared pro se.
- [9] In August 2021, while the trial court had the matter under advisement, an attorney filed an appearance on behalf of Mother, and shortly thereafter Mother filed a Motion to Reopen Record and for Supplementary Evidentiary Hearing. The court granted the motion and set a second evidentiary hearing for October 27 at which additional evidence on the issue of Mother's consent was presented.

[10] At the time of the hearings, Mother was living in Pennsylvania with her boyfriend, R.F. (Boyfriend), and their three-year-old child at Boyfriend's parents' home, where the parents also lived. Mother was not employed but was "looking." *Transcript* at 6. Her employment history consisted of having worked five months in 2017-18 and about one year in 2008-09. Mother has six children and has custody of the aforementioned three-year-old.

[11] Mother testified that, although she had not seen Child in person since 2012, she had "stayed in contact" with him through phone calls and sending presents for his birthday and Christmas. *Id.* at 14. Mother indicated that her communications were limited in 2012-2015 because of drugs and the abusive relationship but that, since 2016, she had sent cards to Child on his birthday and on the holidays of Easter, Halloween, and Christmas. She introduced as exhibits various texts and Facebook Messenger messages that Mother sent to Father in the period of 2016 to the present, reflecting some of her requests to speak to Child. Mother testified that Father often did not respond, but agreed on cross-examination that, sometimes, she blocked Father on Facebook after sending messages to him. Mother indicated she spoke to Child several times a year and estimated the calls would last about half an hour. The last time Mother talked to Child was in November or December 2020.

[12] Mother testified that in 2013 and in 2016 she reached out to Father about an in-person visit with Child but that, each time, Father initially would be agreeable to the idea but when it came to arranging a specific date, Father would indicate that it was not a good time for a visit because Child "was going through some

stuff.” *Id.* at 64. The planned February 2020 visit did not occur because Mother canceled it based on health reasons. Mother stated that in February 2021 she asked if she could come and visit Child, and Father told her he would discuss it with his wife and let her know, but he never responded. Thereafter, she was served in April 2021 with the adoption paperwork. Mother expressed that she loved Child and wished to be able to maintain her parenting rights and keep communicating with him.

[13] Father testified that, between 2012 and 2019, Mother spoke to Child “very rarely, occasionally” and their conversations lasted “no more than ten” minutes. *Id.* at 22, 23. He disagreed with the suggestion that over the years Mother spoke to Child on a “regular” basis and recalled no communication “from 2013 to 2015[.]” *Id.* at 22, 25-26; *see also id.* at 78 (stating that in some years there was no communication). Father testified that, in 2016, Mother’s calls increased in frequency to two or three times per year. He estimated that Child received “six or eight” cards from Mother between 2012 through 2021. *Id.* at 78.

[14] As to whether Mother, in the years prior to 2020, had asked to visit Child, Father stated, “We may have touched on the subject a couple of times, but she was going to try to make arrangements to do so, but other than that, it really never got any further than that.” *Id.* at 22. Father acknowledged that Mother had requested to visit with Child in the spring of 2021 and that he told her by text that Child “has ADHD, ODD, and Aspergers as well as some emotional issues” and that her visiting “would probably not be a good idea.” *Id.* at 24.

Father testified that, since 2020, Child had “dramatically improved” in terms of his behaviors and ability to cope, and Father attributed the progress, in part, to Child’s relationship with Stepmother. *Id.* at 24. Father had concerns that a visit with Mother would negatively impact the stability Child was exhibiting. When asked if Mother has “a relationship” with Child, Father replied, “No.” *Id.* at 23.

[15] Mother countered Father’s testimony, and claimed that she “did not intermittently call,” and rather, “called all the time.” *Id.* at 28. She recalled, “I don’t think there was ever a year I didn’t go without talking to [Child].” *Id.* at 32. For impeachment purposes, Mother presented an April 2021 judgment of conviction and sentence for Father reflecting that he was convicted of Level 6 felony intimidation, Class B misdemeanor battery, and Class B misdemeanor false informing.

[16] In her pro se cross-examination of Father at the first hearing, Mother asked Father to agree that, if the adoption was granted, he would permit her to talk to Child, to which Father responded that he “would be willing to deal with it on a call to call basis, provided the calls didn’t come in all hours of the night.” *Id.* at 29. When Mother asked Father if she could visit Child, Father responded similarly:

As [Child] matures, and he will have to mature, he’s, he has a lot of emotional baggage and things that he has to deal with and get past, I’d be willing to talk to him about talking to you or, at some point, possibly traveling to see you once he’s old enough to understand the complexities of that agreement, and it would have

to be a family decision between my wife, myself, and our son. As long as you're willing and able to understand that and comply with it, I'm willing to entertain that option at some point in the future.

Id. at 29-30.

[17] On December 3, 2021, the court issued findings and conclusions determining that Mother's consent was not required due to lack of significant communication. Among other things, the court found that between 2013 and 2016, Mother "had very little contact" with Child, both because she was abusing drugs and because she was in a controlling relationship, but that Mother "had increased phone contact" with Child during 2019 and 2020.

Appellant's Appendix at 131. The court's findings also included:

23. Still, Mother has not seen nor had any physical contact with Child since 2012. She made no effort to see the child, arrange any trip to spend time with him, nor to arrange a trip for Child to come to Pennsylvania to see her between 2012 and 2020. In late 2020, Father and Mother agreed that she could come to Indiana to spend time with Child. However, Mother was unable to make the trip for health reasons. The parties agree this is the only discussion, the only plans, and the only attempt Mother made to see Child since she saw him in Indiana, in 2012, when Child was two (2) years old.

24. Mother asserts, and Father does not contest, that she sent Child Christmas presents, purchased by her father. Mother produced evidence of such presents, purchased by her father on Amazon for the years 2014, 2019, and 2020. However, there is no physical evidence of presents for any other years, and it is unknown if any were sent;

25. Since 2019, Mother had more contact with Child than she did in previous years. Still her communications with him were limited to phone calls, occurring every couple of months[.]

Appellant's Appendix at 131-32. The court concluded, in part:

45. [A]ssuming arguendo that th[e] period [from 2013-2016] should be excluded from consideration on a finding that her drug addiction and her controlling relationship was a *justifiable* reason for her failure to contact Child between 2012 and 2016, her contacts in 2017, 2018, and into 2019 were few.

* * *

47. Neither party can describe a single meaningful exchange between Mother and the child. Even if gifts were sent (which tangible evidence is mostly lacking) every single year, and even if Mother called every three or four months (which again, evidence is scant), and even if the court were to find Mother's absence excusable between the years between 2012 and 2016, this court cannot find that a few phone calls, every 3-4 months, in 2017 and 2018 (and even 2019) amount to more than the bare minimum effort to maintain a relationship with Child. Nothing in the record suggests Father prevented contact during this period. Nothing in the record justifies Mother's lack of visitation with the child at least once during this period. Nothing suggests Father ever blocked her from coming to Indiana to see the child, or from having a relationship with him.

Id. at 136-37 (cleaned up) (emphasis in original). The court determined that Father proved Mother failed to communicate significantly with Child for a period of one year when able to do so and thus her consent was not required.

[18] On January 4, 2022, the court held a final hearing on the adoption petition, after which it issued a decree finding that adoption is in Child’s best interest and granting Stepmother’s petition. Mother now appeals.

Discussion & Decision

[19] “An adoption is a creature of paradox: it cements one relationship while it terminates another.” *Matter of Adoption of I.B.*, 163 N.E.3d 270, 273 (Ind. 2021). In family law matters, we generally show “considerable deference” to the trial court’s decision “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.” *In re Adoption of E.B.F.*, 93 N.E.3d 759, 762 (Ind. 2018) (cleaned up).

So, 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. And we will not disturb that decision unless the evidence leads to but one conclusion and the trial judge reached an opposite conclusion. We will not reweigh evidence or assess the credibility of witnesses. Rather, we examine the evidence in the light most favorable to the trial court’s decision.

Matter of I.B., 163 N.E.3d at 274 (cleaned up).

[20] Father requested and the court entered findings of fact and conclusions of law on the issue of Mother’s consent. In such a case, we apply a two-tiered standard of review: first determine whether the evidence supports the findings and second, determine whether the findings support the judgment. *In re*

Adoption of T.L., 4 N.E.3d 658, 662 (Ind. 2014); *see also* Ind. Trial Rule 52(A). Factual findings are clearly erroneous if the record lacks any evidence or reasonable inferences to support them, and a judgment is clearly erroneous when it is unsupported by the findings of fact and the conclusions relying on those findings. *Id.* (quotation omitted). Clear error occurs when our review of the evidence most favorable to the judgment leaves us firmly convinced that a mistake has been made. *In re Paternity of K.C.*, 171 N.E.3d 659, 673 (Ind. Ct. App. 2021).

I. Consent

[21] Parental consent is generally required to adopt a child in Indiana. *In re Adoption of S.W.*, 979 N.E.2d 633, 639 (Ind. Ct. App. 2012). However, Ind. Code § 31-19-9-8 allows a trial court to dispense with parental consent in certain enumerated circumstances. As is relevant here, consent is not required from a parent of a child in the custody of another person if for a period of at least one year the parent fails without justifiable cause to communicate significantly with the child when able to do so. I.C. § 31-19-9-8(a)(2)(A). The petitioner bears the burden of proving by clear and convincing evidence that the natural parent's consent is unnecessary. *In re T.L.*, 4 N.E.3d at 662. "The reasonable intent of the statute is to encourage non-custodial parents to maintain communication with their children and to discourage non-custodial parents from visiting their children just often enough to thwart the adoptive parents' efforts to provide a settled environment for the children." *In re Adoption of C.E.N.*, 847 N.E.2d 267, 272 (Ind. Ct. App. 2006).

[22] At issue in this case is whether Mother’s communications were significant. Our courts have recognized that a determination on the significance of the communication is not one that can be mathematically calculated to precision. *Matter of I.B.*, 163 N.E.3d at 276. On one hand, a single significant communication within one year is sufficient to preserve a non-custodial parent’s right to consent to the adoption. *Id.* On the other hand, multiple and consistent contacts may not be found to be significant in context. *Id.*

[23] The record reflects that, from 2012 to 2015, when Mother was battling substance abuse and in an abusive relationship, she had little communication with Child.³ The parties appear to be in agreement that Mother’s communications with Child increased after she became sober, but they characterize differently the frequency and extent of those post-2016 communications – with Mother describing them as occurring on a regular basis on Child’s birthday and holidays, and Father describing Mother’s communications as being “very rare[]” and “sparce[.]” *Transcript* at 22, 23.

[24] The evidence most favorable to the judgment is that, in 2016 and thereafter, Mother called Child three or four times per year, with conversations lasting ten minutes or less. Father stated that Mother sent six to eight cards to Child from 2016 through 2021. He testified that there were periods of at least a year when

³ Father acknowledges that Mother “is perhaps entitled to a certain amount of leniency for her lack of communication during that period,” and the trial court effectively excluded that period from consideration, opining that “it was a justifiable reason for her failure to contact [Child.]” *Appellant’s Brief* at 10; *Appellant’s Appendix* at 136.

he did not hear from Mother, and Mother could not state conclusively that she never went a year without speaking to Child.

[25] Of greatest import, perhaps, is the fact that Mother last saw Child in person in 2012, when Child was around two years old; he was almost eleven at the time of the 2021 hearings. Mother last spoke to Child “between his birthday and Christmas” of 2020. *Transcript* at 15. While Mother asserted that Father delayed phone calls and prevented or thwarted more recent requests to visit, Father testified that, due to Child’s diagnosed emotional and behavioral issues, including ADHD, ODD, and social anxiety, he believed that a visit from Mother in 2021 after so many years would be disruptive to Child, who particularly needed structure and stability. Evidently, the court credited Father’s explanation, concluding, “Nothing in the record suggests [Father] prevented contact[.]” *Appellant’s Appendix* at 136.

[26] In giving guidance to courts in determining what constitutes significant communication, our Supreme Court has identified “a familiar theme”:

A parent who meets society’s expectations by maintaining a connection with her child and by financially supporting her child cannot have her legal relationship with the child severed without her consent. Conversely, when a parent fails to maintain a meaningful relationship with, or fails to financially support, that child, she loses her right as a natural parent to withhold consent to adoption.

Matter of I.B., 163 N.E.3d at 276.

[27] The evidence most favorable to the judgment does not reflect that Mother maintained a meaningful relationship with Child, and we find no error with the trial court’s decision that Mother’s consent was not required due to her failure to communicate significantly with Child for a period of a year. *See id.* at 276-77 (holding that phone contact between a parent of child averaging thirteen minutes per month was not significant where the parent did not send the child letters and did not visit with the child as she was permitted to do pursuant to the custody order); *In re C.E.N.*, 847 N.E.2d at 272 (finding sufficient evidence to support trial court’s conclusion that parent failed without justifiable cause to communicate significantly with child where parent’s communication and visitation was “sporadic over the last few years and has been no longer than ten to fifteen minutes at a time”).

II. Best Interests

[28] “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.*; *see also* I.C. § 31-19-11-1. While the adoption statutes do not provide guidance regarding the factors a court is to consider when determining the best interests of the child, appellate courts have noted that there are strong similarities between the adoption statute and the termination of parental rights (TPR) statute in this respect. *See e.g., In re M.S.*, 10 N.E.3d at 1281. In TPR cases, reviewing courts 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). Factors to consider include the bond between parent and child, whether the relationship between parent and child included abuse or neglect by the parent, the parent’s history of criminal activity, and the child’s need for permanency. *See, e.g., In re: R.S.*, 56 N.E.3d 625, 629-30 (Ind. 2016); *In re: K.T.K.*, 989 N.E.2d 1225, 1235 (Ind. 2013); *In re: G.Y.*, 904 N.E.2d 1257, 1265 (Ind. 2009).

[29] Mother acknowledges that “it is possible to say that [Mother] has not been a very involved parent, but she has not abused or neglected [Child] and [Father] has not demonstrated that she is unable to provide for [Child]’s necessities.” *Appellant’s Brief* at 18-19. She maintains that the evidence “falls far short of what is necessary to establish that the adoption is in the child’s best interests.” *Id.* at 18. We disagree.

[30] As to whether a bond exists between Child and Mother, their communications over the course of ten years amounted to what the trial court viewed as “the bare minimum effort to maintain a relationship[.]” *Appellant’s Appendix* at 136. We agree with the trial court’s observation that neither party described “a single meaningful exchange between [Mother] and the child.” *Id.* Further, Father opined that no bond currently exists between Child and Mother.

[31] In terms of stability, Child has lived with Father since 2011. Father and Stepmother began a relationship in 2019 and married in 2020, and evidence was presented that Stepmother and Child have a positive relationship. Father

testified that Stepmother assists with handling Child's developmental issues, both in terms of his schooling and his medical needs, and Father testified to Child's dramatic improvement in the last couple of years.

[32] As to whether Mother can provide for Child's necessities, the record reflects that Mother has managed to remain sober since 2017, which we commend. However, she has little employment history, lives with her in-laws, and there is no evidence as to her or Boyfriend's ability to provide for Child.

[33] Mother highlights that there was no recommendation from a GAL or CASA to support the trial court's best interests conclusion. While a third-party recommendation is often utilized in TRP situations, and could be useful to a trial court in reaching a best interests decision in an adoption context, there is no requirement of such. *See, e.g., In re Adoption of M.L.*, 973 N.E.2d 1216, 1224 (Ind. Ct. App. 2012) (finding that adoption was in child's best interest without testimony of third party recommendation).

[34] The trial court's best interest determination and adoption decree was not clearly erroneous.

[35] Judgment affirmed.

Vaidik, J. and Crone, J., concur.