

## 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

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B.S.,  
*Appellant-Respondent,*

v.

D.M. and C.M.,  
*Appellees-Petitioners.*

May 24, 2021

Court of Appeals Case No.  
20A-AD-2198

Appeal from the Allen Superior  
Court

The Honorable Charles F. Pratt,  
Judge

The Honorable Lori K. Morgan,  
Magistrate

Trial Court Cause No.  
02D08-1707-AD-129

**Altice, Judge.**

### Case Summary

- [1] In this contested adoption case, we consider whether the trial court clearly erred in ruling that the adoptive child's biological father's consent to the adoption was not required and that the adoption was in the child's best interests.
- [2] We affirm.

### **Facts & Procedural History**

- [3] B.S. (Father) and H.S.M. (Mother) were married briefly and lived with Mother's parents D.M. and C.M. (Grandparents) for several months. The marriage was tumultuous, and Grandparents asked Father to move out in September 2012. Father filed for dissolution of marriage the following month. At the time, Mother was pregnant with L.J.M. (Child), who was born on May 11, 2013.
- [4] Mother and Child continued living with Grandparents, and Father, though aware of the pregnancy and birth, had no contact with Child. Mother is mentally ill and, thus, Grandparents have served as Child's primary care providers, both physically and financially, since his birth. Grandparents were appointed as the guardians of Child by the Allen Superior Court in September 2013. The next month Grandparents filed a petition for third party custody of Child, which was consolidated with the dissolution proceedings. Father also submitted to a DNA test, which confirmed his parentage.
- [5] On April 28, 2014, in the dissolution action, Grandparents were awarded temporary sole legal and physical custody of Child, and Father was granted

supervised parenting time through SCAN. In the order, the court noted Child's strong bond with Grandparents and Father's complete lack of contact with Child since birth. The following findings were also included in the order:

9. [Father] has a felony conviction involving domestic violence.

10. [Father] works between fifty (50) and sixty-five (65) hours per week.

11. [Father] has two (2) other children ages eight (8) and six (6). [Father's] parenting time with his other children is limited. [He] transports the children to school three (3) days per week and has one (1) hour of supervised parenting time with the children on alternate Saturdays.

12. [Father's] work schedule makes it virtually impossible for him to be the primary physical custodian of any child.

13. [Father] is attempting to improve his life through employment and increasing his parenting time with his other children.

14. [Father] intends to establish a relationship with [Child].

*Exhibit Vol. 1* at 3-4. In sum, the court concluded that Grandparents had rebutted the presumption of parental custody by clear and convincing evidence and that Child's best interests would be served by granting them temporary custody. Further, the court determined that unsupervised parenting time with Father "would endanger the child's physical health or significantly impair the child's emotional development." *Id.* at 4. Accordingly, the court granted

Father supervised parenting time, at his expense, “based on a schedule as arranged by [Father] with SCAN” and directed him to “contact Tonya Reilley at SCAN (421-5000) to schedule supervised parenting time.”<sup>1</sup> *Id.* The court deferred the issue of child support to be addressed by the parties during mediation.

[6] After the April 2014 order, Father did not contact SCAN to arrange supervised parenting time with Child, and he did not attempt any other contact with Child. He did, however, continue supervised parenting time with his other children for a period of time. At the end of 2014, the Indiana Department of Child Services became involved and filed a CHINS petition with respect to Father’s older children. He gained custody of them in March 2015, and the CHINS proceedings were closed later that year.

[7] Father has worked steadily, at least full time, since April 2014, as a manager at Papa Johns and then, beginning in May 2016, for Nishikawa Cooper, LLC. Starting in late 2016, he began a second job delivering pizza. His annual income was \$23,583 in 2014, \$43,618 in 2015, \$29,888 in 2016, and \$44,553 in 2017. In 2014, he had monthly car payments of \$200 for his 2004 Chrysler Sebring, and his living expenses were shared with his roommate. He also paid \$55 per week in child support for his older children.

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<sup>1</sup> At the time, Father was already exercising and paying for supervised parenting time twice a month through SCAN with his two older children.

- [8] After he obtained custody of his other children in March 2015, Father moved in with a friend's parents for about seven months and contributed about \$200 to \$250 per month toward living expenses. Thereafter, Father and the children moved back into an apartment with his former roommate. By late 2016, at a new residence with his roommate, Father's share of monthly rent was \$450 and about \$250 to \$300 for other expenses. After wrecking his Sebring, Father purchased, in July 2016, another vehicle – a 2015 Nissan Versa Note – for \$18,000, which raised his monthly car payment from \$200 to \$375.
- [9] Since at least May 2015, Father has had disposable income that he used for monthly recurring charges, such as Netflix, WWE Network, Xbox Online, and to purchase video games, movies, and gifts for himself, his older children, and his girlfriend. Notably, he spent \$125 in June 2016 and \$165 in May 2017 on his girlfriend at Victoria's Secret's. He also made rather large purchases of merchandise from WWE online and UFC FanShop and, from May 2015 to February 2018, "spent a total of \$981.65 in purchases at Disc Replay, GameStop, Best Buy, Microsoft Xbox (non-recurring charges), Wooden Nickel, Entourage music and Luke games." *Appellant's Appendix Vol. II* at 17.
- [10] In April 2017, nearly three years after the prior custody order, Father contacted SCAN regarding supervised parenting time with Child, who was then almost four years old and had never met Father. Grandparents were notified by SCAN of this communication from Father, but they never heard anything further regarding a supervised visit actually being arranged.

[11] On July 21, 2017, Grandparents filed the instant petition for adoption of Child, along with Mother's written consent to the adoption. Father contested the adoption in writing a few days later. On August 24, 2018, the trial court held an evidentiary hearing regarding whether Father's consent to the adoption was required by law. At the hearing, Father acknowledged that he had never had contact with or provided any form of support for Child, who was five years old at the time of the hearing. Father claimed that he did not arrange to exercise supervised parenting time for nearly three years after it was granted in April 2014 because he did not have funds to pay the SCAN fees. While he had some disposable income during that three-year period, he explained, "I wanted to wait until I could afford consistent visits on a regular basis not just sporadic." *Transcript Vol. 2* at 67. Grandparents submitted evidence that the hourly SCAN fees were \$35 in 2014 and then \$40 in 2015 through July 2017. Aside from SCAN visits, Father testified that he made no other efforts to communicate with Grandparents and Child, explaining that he had lost their phone number, he had been blocked on their social media, and they had moved in 2016.

[12] On December 21, 2018, the trial court issued a lengthy order, with extensive findings, and determined that Father's consent to the adoption was not required pursuant to Ind. Code § 31-19-9-8(a)(1) and -(2). Father attempted to appeal this order, but the appeal was dismissed as premature in June 2019. *In re Adoption of L.J.M.*, 129 N.E.2d 836 (Ind. Ct. App. 2019) (memorandum decision).

[13] Thereafter, on August 7, 2020, the trial court held a hearing to determine whether the adoption was in Child's best interests. The trial court then took the matter under advisement and issued its final order on November 4, 2020, granting the adoption. Father now appeals. Additional information will be provided below as needed.

### **Standard of Review**

[14] Our standard of review is well settled.

In family law matters, we generally give 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. 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.

The trial court's findings and judgment will be set aside only if they are clearly erroneous. A judgment is clearly erroneous when there is no evidence supporting the findings or the findings fail to support the judgment. 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.

*E.B.F. v. D.F.*, 93 N.E.3d 759, 762 (Ind. 2018) (cleaned up).

### **Discussion & Decision**

#### *Consent*

[15] I.C. § 31-19-9-8(a) sets out a list of circumstances in which a biological parent's consent to the adoption of their minor child is not required. Relevant here is subsection (a)(2), which provides that consent is not required from the following:

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.

The statute is written in the disjunctive and, therefore, either of the above provides independent grounds for dispensing with parental consent. *In re Adoption of M.L.*, 973 N.E.2d 1216, 1222 (Ind. Ct. App. 2012). The trial court found that both were proven by clear and convincing evidence in this case.

[16] We begin by addressing Father's lack of communication with Child. Father does not dispute that he failed to communicate with Child for a number of years, including for three years after being granted supervised parenting time. Indeed, at the time of the consent hearing, Father had never met Child, who was already five years old and had been in Grandparents' care his entire life. Father's sole argument on appeal is that the evidence was insufficient to establish that his failure to communicate was not justified. In this regard, Father asserts that he did not have the ability to pay for consistent supervised



visits through SCAN and that Grandparents thwarted his ability to communicate with Child. The trial court found otherwise on both grounds, and we reject Father's invitation to reweigh the evidence.

[17] The court provided extensive findings of facts that included details of Father's income and expenses from April 2014 through 2017. The court found that Father made unnecessary purchases during this period of time and that such funds could have been used to pay for supervised parenting time or to provide support for Child. The court's findings included:

27. [Father] has not seen the child since birth. His testimony that he was unable to afford the visits is not credible in light of the income earned and expenditures made from the time of the entry of the supervised parenting time order to the time of the trial in this case.

28. There was no allegation made, nor any evidence presented, that showed that [Father] attempted to have any parenting time with the child from April 28, 2014 through mid-April of 2017, nor was there any evidence presented that [Grandparents] made any efforts to interfere with his parenting time during that timeframe.

29. During the trial, [Father] contended that although he could have spent some of the money spent on games and DVD's on supervised parenting time with his son, he chose not to do so because he did not want the visits with [Child] to be inconsistent. Given a consideration of the cost of the supervised parenting time and the monthly sums spent on gaming and other non-necessary items, the Court does not find said statement to be credible.

30. At trial, [Father] acknowledged that he never made any attempts to communicate with the child by letter or card and that he did not send gifts to the child for his birthday or other holidays.

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36. The Court finds by clear and convincing evidence that [Father] has never met the child and had not made any attempts to visit the child or communicate with him from the time of the entry of the supervised parenting time order on April 28, 2014, until mid-April of 2017, despite the fact that there were a number of methods by which [he] could have contacted the child and could have initiated parenting time with the child, or otherwise engaged in communication with him, however, he failed without justifiable cause to do so.

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45. A review of the testimony and evidence presented at trial reveals that although [Father's] income was somewhat limited in the year 2014, [Father] did not make any attempts to contact [SCAN] to determine what the fees were or whether arrangements could be made to modify or lower the fees nor did he file any pleadings with the Court seeking a modification of the order due to his financial circumstances. In the years following 2014, [Father's] income increased by approximately Twenty Thousand Dollars (\$20,000.00) yet [Father] did not make any attempts to initiate supervised parenting time with the child. Evidence presented at trial revealed that during the course of the proceedings, [Father] has had steady employment. He has spent money on video games, DVD's and other items that were not necessities and acknowledged at trial that those sums could have been spent on the [SCAN] fees. [Father] has had a roommate during the majority of the time ... and he and his roommate have

shared monthly living expenses thus reducing his living expenses by fifty percent (50%).

46. At trial, [Father] alleged that he did not initiate visits or exercise parenting time with his child at [SCAN] because he did not want his visits with the child to be inconsistent. The Court finds, however, that he failed to initiate any type of contact with the child, including contact by telephone, mail or electronic means. He made no attempts whatsoever in an almost three year period to have any type of communication with the child. [Father's] motivation in not wanting his parenting time with the child to be inconsistent does not rise to the level of justifiable cause excusing his failure to make even one attempt at communication with the child in an almost three (3) year period. The consent statute does not contemplate "regular" communication, but rather one of significant communication .... The statute does not require [Father's] visits with the child to be regular, rather it requires them to be meaningful. Instead, [Father] chose not to communicate or exercise parenting time at all.

*Appellant's Appendix Vol. II* at 18-23.

[18] Father does not directly challenge any of the above findings. He simply makes a general argument that his income was limited from 2014 through early 2017 and that he struggled during this time to pay bills and support his two older children. Thus, Father asserts that "paying \$120 a month for consistent supervised visits with [Child] was beyond his financial means." *Appellant's Brief* at 18. Again, we reject Father's invitation to reweigh the evidence.

[19] As set forth in detail above, the trial court found that Father worked steadily and, by 2015, had disposable income that he regularly spent on unnecessary

things, such as video games and subscription services, rather than on visits through SCAN. Further, SCAN fees were \$35 per hour in 2014 and \$40 per hour thereafter until August 2017. At a minimum, Father could have had monthly contact with Child for only \$35 or \$40 per month for the three years following the 2014 parenting time order. He chose, instead, to have no contact. Regarding Father's suggestion that he was waiting until he could afford consistent bi-monthly visits through SCAN, we observe, as did the trial court, that this is not a legitimate justification for having no contact for years on end. *See In re Adoption of Subzda*, 562 N.E.2d 745, 749-50 (Ind. Ct. App. 1990) (rejecting father's claim that distance and lack of transportation made it impossible for him to see his son on a regular basis and thus justified his complete lack of communication for two years). Father's failure to attempt any communication with Child, via SCAN or otherwise, for the three-year period following the 2014 order is not supported by justifiable cause.

[20] Moreover, Father's suggestion that Grandparents thwarted his attempts to communicate with Child is without merit. While efforts to hamper communication between a parent and child are relevant in determining the ability to communicate, the record establishes that Father made no effort to contact or visit Child for well over a year following the 2014 order. *See id.* at 750. Father knew where Grandparents and Child lived until their move in September 2016, Grandparents' phone numbers never changed, and Father had the ability to contact them through SCAN. The trial court correctly found "no evidence of record that [Grandparents] took any steps to thwart or interfere

with [Father's] exercise of parenting time with child." *Appellant's Appendix Vol. II* at 23.

- [21] The evidence in this case leads to but one conclusion, which is the one reached by the trial court. Grandparents established by clear and convincing evidence that Father failed without justifiable cause to communicate significantly with Child when able to do so for well over a year. Accordingly, Father's consent was not required.<sup>2</sup>

#### *Best Interests*

- [22] "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). Accordingly, "even if a court determines that a natural parent's consent is not required for an adoption, the court must still determine whether adoption is in the child's best interests. *In re Adoption of O.R.*, 16 N.E.3d 965, 974 (Ind. Ct. App. 2014) (cleaned up); *see also* I.C. § 31-19-11-1(a)(1).
- [23] Here, the trial court's best interests determination in the 2020 adoption decree was supported by a number of findings, including the following:

The child is well bonded with [Grandparents]. They are essentially the only parents that he has ever known.  
[Grandparents] are providing a safe, stable, loving home

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<sup>2</sup> Because we have found sufficient evidence on the issue of failure to communicate, we need not address the alternative basis for dispensing with Father's consent based on the trial court's conclusion that Father knowingly failed to provide for Child's care and support when able to do so as required by law.

environment for the child. Neither of the child's parents has had a significant amount of contact with him. They have not provided care for the child since the child's birth. The child has special needs<sup>[3]</sup> and [Grandparents] are aware of his special needs and have a specialized plan and routine in place for the child to address the child's needs. The Respondent father has not had contact with the child or [Grandparents] and thus is unaware of the child's needs and the treatment required to address his needs.

*Appellant's Appendix Vol. II* at 31.

[24] Father does not dispute any of the above. He simply argues in two sentences: "The father contends it is not in the child's best interest to be adopted as it will exclude the father's side of the family, including the child's half-brothers. The child remains in consistent contact with his biological mother and maternal side of the family." *Appellant's Brief* at 18. We find Father's arguments empty. By his own actions, Father excluded himself and his side of the family from Child's life for many years. All that time, Grandparents provided the loving, stable home that Child needed, while Father remained a stranger to Child. The trial court's determination that Grandparent's adoption of Child was in Child's best interests is amply supported by the evidence.

[25] Judgment affirmed.

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<sup>3</sup> Child has been diagnosed with ADHD. Grandparents have placed Child in a private school in order for him to have more individualized attention, and Child sees a counselor who works with him on transitioning skills.

Kirsch, J. and Weissmann, J., concur