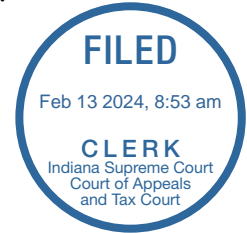


MEMORANDUM DECISION

Pursuant to Ind. Appellate Rule 65(D), this Memorandum Decision is not binding precedent for any court and may be cited only for persuasive value or to establish res judicata, collateral estoppel, or law of the case.



IN THE
Court of Appeals of Indiana

In the Matter of the Adoption of R.S. (Minor Child);
A.K. and M.S.,
Appellants-Respondents

v.

J.S. and G.S.,
Appellees-Petitioners

February 13, 2024

Court of Appeals Case No.
23A-AD-1908

Appeal from the Vanderburgh Superior Court
The Honorable Renee Allen Ferguson, Magistrate

Trial Court Cause No.
82D04-2212-AD-186

Memorandum Decision by Judge Tavitas
Judges Pyle and Foley concur.

Tavitas, Judge.

Case Summary

- [1] A.K. (“Mother”) and M.S. (“Father”) (collectively “Parents”) appeal the order of the trial court granting a petition to adopt their minor child, R.S., that was filed by the child’s paternal grandparents, J.S. (“Grandmother”) and G.S. (“Grandfather”) (collectively “Grandparents”). Parents argue that the trial court erred by concluding that their consent to the adoption was not required due to: (1) Parents’ failure to communicate with R.S. for over a year when able to do so; (2) Parents’ failure to provide care or support to R.S. for over a year when able to do so; and (3) Parents’ abandonment of R.S. We conclude that the trial court did not clearly err in concluding that Parents failed to provide care and support for R.S. as required by law for over a year despite being able to do so. Accordingly, we agree that Parents’ consent to the adoption was not required, and we affirm.

Issue

- [2] We find one of the three issues raised by Parents to be dispositive: whether the trial court clearly erred by concluding that Parents, despite being able to do so, failed to provide care and support for R.S. for a period of at least one year.

Facts

- [3] R.S. was born in July 2018. At birth, R.S.’s blood tested positive for alcohol and illicit drugs. Due to this and Parents’ unstable living conditions, the Department of Child Services (“DCS”) filed a petition in Dubois Circuit Court

alleging that R.S. was a child in need of services (“CHINS”). DCS placed R.S. with Grandparents after R.S. was released from the hospital. Following a hearing on September 7, 2018, the trial court found R.S. to be a CHINS. R.S. remained with Grandparents at this time.

[4] In February 2019, the State filed a paternity action in Gibson Circuit Court seeking to legally establish Father’s paternity. Three days later, the State filed a similar action in Dubois Circuit Court. These cases were ultimately consolidated with the CHINS case. As part of the paternity case, the trial court ordered Father in March 2019 to pay child support by way of an income withholding order. A record from the Gibson County Child Support Office shows that Father paid weekly child support through the withholding order from April 1, 2019, through April 13, 2020. The amount withheld was initially \$91 but increased to \$111 in June 2019.

[5] On March 3, 2020, the CHINS court entered an order placing R.S. with Parents on a trial basis to begin on March 9, 2020.¹ Shortly thereafter, Father stopped paying child support, apparently due to the fact that R.S. was now in the care of Parents.

¹ Grandparents objected to this change in placement and intervened in the CHINS case. The trial court overruled Grandparents’ objection to the change in placement, and Grandparents appealed. This Court, however, dismissed the appeal with prejudice because Grandparents were appealing from a non-final order. *See G.S et al. v. Ind. Dep’t of Child Servs.*, 20A-JC-00551 (order entered July 6, 2020).

- [6] On November 23, 2020, the CHINS court again removed R.S. from Parents' care.² Grandparents filed a petition for third-party custody, and the CHINS court placed R.S. back in Grandparents' care the following day. On February 4, 2021, the trial court closed the CHINS case, but the paternity case remained open.
- [7] In May 2021, Grandfather, on behalf of R.S., filed ex parte petitions for protection orders against Father and J.W., who supervised Parents' visitations with R.S. Grandmother testified that Grandparents did so on the advice of DCS. The trial court issued the protection orders, but the protection order cases were dismissed in the fall of 2022.
- [8] Before the protective orders were dismissed, Grandparents offered Parents visitation through the Parenting Time Center. Grandparents filled out all the necessary paperwork and indicated their willingness to work around Parents' schedules to assist in visitation. On April 6, 2022, Grandparents filed a motion for an alternate visitation supervisor, in which they requested the trial court to order Parents' visitations to take place at the Parenting Time Center. The trial court granted this motion on June 1, 2022, and ordered Parents to exercise their visitation at the Parenting Time Center. The trial court ordered Parents to pay the expense of travel and the costs associated with the Center in lieu of child support.

² Grandfather later testified that R.S. was with Parents for two months and was with another party—whose identity is not clear from the record—for another seven months.

- [9] Father initially told the Center that he did not wish to use their services. But on June 8, 2022, he called back to schedule an intake appointment for both Parents. The intake process was completed on June 24, and Father contacted the Center to arrange visitations. Due to the protection order, however, Father was initially unable to schedule visitation. The Center informed Parents that grants were available that might pay for the costs associated with the Center if Parents were willing to attend certain classes. Father, however, found it difficult to attend these classes due to his work schedule. Ultimately, Parents agreed to simply pay for the costs directly and complete another intake.
- [10] On December 19, 2022, in Vanderburgh Superior Court, Grandparents filed a petition to adopt R.S. On January 3, 2023, Grandparents amended the petition and filed a motion to consolidate the paternity action with the adoption action, which the trial court subsequently granted. Parents filed objections to the adoption petition on January 23, 2023.
- [11] On March 7, 2023, Parents filed a petition for contempt in the paternity action (before it was consolidated with the adoption action), claiming Grandparents were thwarting Parents' visitation with R.S. Records from the Parenting Time Center indicate that, when Father called the Center on March 6 to inquire about visitation, the Center informed him that Grandmother "did not want to schedule visits." Ex. Vol. p. 66. It appears that no action was ever taken on the contempt issue. Ultimately, Parents never successfully scheduled any visits at the Center.

[12] The trial court held a hearing on the adoption petition on June 22, 2023, at which all parties were represented by counsel and testified. At the end of the hearing, the trial court took the matter under advisement. On July 19, 2023, the trial court entered an order concluding that Parents' consent to the adoption was not required. This order provides in pertinent part:

[T]he court now finds that [M]other and [F]ather's consent is not necessary and that it is in the best interest for the child to be adopted by the Petitioners, [Grandfather] and [Grandmother].

The father, [Father], and the mother, [Mother], have failed to have any significant and meaningful contact with the child, in excess of one (1) year. The parents have been aware of the child's location and contact information prior to and throughout adoption proceedings. There was no testimony that [Grandparents] ever withheld or thwarted any contact by the [F]ather and [M]other with the child. Father had a child support order. The Gibson County Family Court suspended father's child support to enable him to afford professionally supervised visitation. For reasons that were never made clear during testimony, father and mother never visited with the child.

The parents failed to provide support for the child when able to do so. Father testified he has been employed since 2018. The court finds that the [F]ather and [M]other have not given [Grandparents] any material items or gifts to help support the child.

The child has a significant emotional bond with [Grandparents]. The child has lived her entire life with [Grandparents]. They are all she knows as parents. The [Grandparents] can provide the love, safety, and stability that every child needs. Considering all testimony and evidence, the court finds that it is in the best interest of the child to be adopted.

For the foregoing reasons stated above the court finds that [Parents'] consent is not required

Appellant's App. Vol. II p. 2-3.³ Parents now appeal.

³ Parents do not argue that the trial court's Order of Adoption is statutorily insufficient. Still, we note that Indiana Code Section 31-19-11-1(a) provides:

- (a) Whenever the court has heard the evidence and finds that:
- (1) the adoption requested is in the best interest of the child;
 - (2) the petitioner or petitioners for adoption are of sufficient ability to rear the child and furnish suitable support and education;
 - (3) the report of the investigation and recommendation under IC 31-19-8-5 has been filed;
 - (4) the attorney or agency arranging an adoption has filed with the court an affidavit prepared by the Indiana department of health under IC 31-19-5-16 indicating whether a man is entitled to notice of the adoption because the man has registered with the putative father registry in accordance with IC 31-19-5;
 - (5) proper notice arising under subdivision (4), if notice is necessary, of the adoption has been given;
 - (6) the attorney or agency has filed with the court an affidavit prepared by the Indiana department of health under:
 - (A) IC 31-19-6 indicating whether a record of a paternity determination; or
 - (B) IC 16-37-2-2(g) indicating whether a paternity affidavit executed under IC 16-37-2-2.1;has been filed in relation to the child;
 - (7) proper consent, if consent is necessary, to the adoption has been given;
 - (8) the petitioner for adoption is not prohibited from adopting the child as the result of an inappropriate criminal history described in subsection (c) or (d); and
 - (9) the person, licensed child placing agency, or local office that has placed the child for adoption has provided the documents and other information required under IC 31-19-17 to the prospective adoptive parents;

the court shall grant the petition for adoption and enter an adoption decree.

The trial court's relatively sparse Order of Adoption does not address many of the subjects set forth in this statute. We presume, however, that trial courts know and followed the applicable law. *In re Paternity of A.R.S.*, 198 N.E.3d 423, 431 (Ind. Ct. App. 2022) (citing *Hecht v. Hecht*, 142 N.E.3d 1022, 1031 (Ind. Ct. App. 2020)).

Discussion and Decision

A. Standard of Review

[13] On appeal, Parents argue that the trial court erred when it concluded that their consent was not required for the adoption. We recently observed:

We generally show considerable deference to the trial court's decision in family law matters 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. 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. [W]e 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.

In re Adoption of C.W., 202 N.E.3d 492, 495 (Ind. Ct. App. 2023) (citing *In re Adoption of I.B.*, 163 N.E.3d 270, 274 (Ind. 2021)) (quotations and internal citations omitted).⁴

⁴ We note that Grandparents did not file an appellees' brief. Where the appellees do not submit a brief on appeal, the appellate court need not develop an argument for the appellees but instead will reverse the trial court's judgment if the appellant's brief presents a case of prima facie error. *In re Adoption of E.B.*, 163 N.E.3d 931, 935 (Ind. Ct. App. 2021) (citing *Salyer v. Washington Regular Baptist Church Cemetery*, 141 N.E.3d 384, 386 (Ind. 2020)). "This less stringent standard of review 'relieves [us] of the burden of controverting arguments advanced in favor of reversal where that burden properly rests with the appellee.'" *Id.* (quoting *Jenkins v. Jenkins*, 17 N.E.3d 350, 352 (Ind. Ct. App. 2014)). We are obligated, however, to correctly apply the law to the facts in the record in order to determine whether reversal is required. *Id.* at 936. As explained below, we conclude that Parents have not established prima facie error.

[14] We also observed in *C.W.* that “[o]ur Supreme Court has held that ‘[a] natural parent enjoys special protection in any adoption proceeding,’ and we ‘strictly construe our adoption statutes to preserve the fundamentally important parent-child relationship.’” *Id.* (quoting *I.B.*, 163 N.E.3d at 274). Pursuant to Indiana Code Section 31-19-9-1(a)(2), “a petition to adopt a child who is less than eighteen (18) years of age may be granted only if written consent to adoption has been executed by . . . [t]he mother of a child born out of wedlock and the father of a child whose paternity has been established. . . .” “[U]nder carefully enumerated circumstances,’ however, the adoption statutes allow ‘the trial court to dispense with parental consent and allow adoption of the child.’” *C.W.*, 202 N.E.3d at 495 (quoting *I.B.*, 163 N.E.3d at 274).

[15] These enumerated circumstances are set forth in Indiana Code Section 31-19-9-8, which provides:

(a) Consent to adoption, which may be required under section 1 of this chapter, is not required from any of the following:

(1) A parent or parents if the child is adjudged to have been abandoned or deserted for at least six (6) months immediately preceding the date of the filing of the petition for adoption.

(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.

(b) If a parent has made only token efforts to support or to communicate with the child the court may declare the child abandoned by the parent.

[16] Applying this statute in *C.W.*, we noted:

If a petition for adoption alleges that a natural parent's consent is unnecessary under these circumstances, and the natural parent contests the adoption, the petitioner carries the burden of proving that the natural parent's consent is unnecessary. The party bearing this burden must prove his or her case by clear and convincing evidence.

202 N.E.3d at 496 (citing *I.B.* 163 N.E.3d at 274-75).

C. Parents' Arguments

[17] Here, the trial court found that, for a period in excess of one year, Parents failed to have significant and meaningful contact with R.S. when able to do so, and knowingly failed to provide care and support for R.S. as required by law when able to do so. *See* I.C. § 31-19-9-8(a)(2)(A), (B). Because Indiana Code Section 31-19-9-8 is written in the disjunctive, we may affirm if the trial court's findings are supportable on either of these independent grounds for dispensing with the requirement for parental consent. *See C.W.*, 202 N.E.3d at 496 (citing *I.B.*, 163 N.E.3d at 275). Considering only the evidence favorable to the trial court's decision, as we must, we conclude that the trial court did not clearly err.

[18] Parents argue that the trial court erred by finding that they, for a period of at least one year, failed to provide any support as required by law even though

they were able to do so. Our Supreme Court has held that “[a] petitioner for adoption must show that the noncustodial parent had the ability to make the payments that she failed to make.” *I.B.*, 163 N.E.3d at 277 (quoted in *C.W.*, 202 N.E.3d at 497). In making this determination, the trial court “must look at the totality of the circumstances to determine the parent’s ability to pay, not just his or her income (or lack of income).” *Id.* Further, Indiana law imposes a duty upon parents to support their children, and this duty exists apart from any court order or statute. *In re Adoption of M.A.S.*, 815 N.E.2d 216, 220 (Ind. Ct. App. 2004) (citing *Irvin v. Hood*, 712 N.E.2d 1012, 1014 (Ind. Ct. App. 1999)).

[19] Here, Grandmother testified that, when she applied for TANF⁵ to help support R.S., the State was required to seek support from Father in the paternity action. Father then paid child support through an income withholding order from April 1, 2019, through April 13, 2020, at which time R.S. was placed back in the care of Parents for a trial period. This trial period ended on November 23, 2020, when the trial court removed R.S. from Parents’ care and placed her back with Grandparents the following day. There is evidence that Parents paid no support for R.S. after the child was returned to Grandparents’ care.

[20] Grandmother testified that she never received support for R.S.⁶ In addition Mother testified that, although she took “clothes, diapers, and things like that”

⁵ TANF refers to the federal Temporary Assistance to Needy Families program. *Perdue v. Gargano*, 964 N.E.2d 825, 828 (Ind. 2012).

⁶ Grandmother testified that she never used the money from TANF because she was under the belief that any money would be refunded to Parents.

to Grandparents in 2018, since that time, she never “provided anything to [Grandparents] for [R.S.]’s benefit.” Tr. Vol. II p. 45. Father testified that, after November 2021 he sent nothing to Grandparents to help support R.S. Tr. Vol. II p. 54. Father claimed that “it just never occurred to [him]” to simply send a check or cash to Grandparents to help support R.S. *Id.* at 64. At a minimum, the evidence shows that Parents failed to provide any support for R.S. after November 2021; Grandparents filed the petition to adopt in December 2022, over a year later.

[21] As to Parents’ ability to pay, Mother testified that she receives \$800 per month in disability benefits. Father testified that he makes at least \$15 per hour,⁷ works thirty-six hours per week in the winter and forty hours per week “during busy season,” and gets an extra ten hours of work every other week. *Id.* at 51. Thus, Father grossed in excess of \$2,000 per month.⁸ Combined with Mother’s disability benefits, Parents received at least \$2,800 per month, with \$2,250 left over after their \$550 monthly rent payment. Father testified that Parents’ utilities totaled approximately \$180 per month and that their phone bill had been \$200 per month but had recently been reduced to \$80 per month. Despite this, Parents made no attempt to support R.S. after she left their home in November 2021. Parents also never paid any of the costs associated with

⁷ Father testified that he “started out at \$15.00 an hour,” but claimed not to know his current hourly rate. Tr. Vol. II, p. 50.

⁸ Thirty-six hours per week at \$15.00 per hour equals \$540 per week. Father testified that he rarely took time off work except from November 2019 to January or February of 2020, when he was injured following a bike accident. He admitted that he had worked steadily from February 2020.

visitations at the Parenting Time Center, as ordered by the trial court in lieu of child support.⁹

[22] Given this evidence, the trial court did not clearly err by concluding that Grandparents had met their burden of establishing that Parents, despite being able to do so, failed to provide care and support for R.S. as required by law for a period of at least one year. Because Parents failed to support R.S. for a period of at least one year, their consent to the adoption was not required. See I.C. § 31-19-9-8(a)(2)(B). Since Section 31-19-9-8 is written in the disjunctive, we need not address Parent’s arguments that the trial court erred by concluding that Parents failed to have significant and meaningful contact with R.S. and abandoned her.

Conclusion

[23] The trial court did not clearly err in concluding that Parents’ consent to the adoption of R.S. by Grandparents was not required due to Parents’ failure to provide care and support for R.S. as required by law for a period of at least one year despite being able to do so. Accordingly, we affirm the judgment of the trial court.

⁹ Parents claim in their brief that they paid for the intake process at the Parenting Time Center. The only evidence of this was Father’s testimony that, after the grant application was unsuccessful, Father “agreed to pay for it.” Tr. Vol. II p. 62. The trial court was not required to credit Father’s testimony in this regard. The records admitted from the Parenting Time Center merely state that Parents completed the intake, without explaining how payment was made. *See Ex. Vol. pp. 60-66.* More importantly, Parents admitted that they could simply have paid \$50 per hour to visit their daughter at the Center but failed to do so.

[24] Affirmed.

Pyle, J., and Foley, J., concur.

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