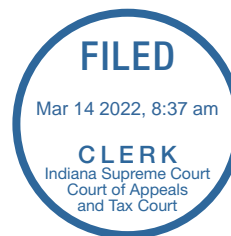


MEMORANDUM DECISION

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 re the Adoption of Minor
Children P.B. and S.B.,
K.D.,
Appellant,

v.

R.B. and L.B.,
Appellees.

March 14, 2022

Court of Appeals Case No.
21A-AD-2267

Appeal from the Huntington
Circuit Court

The Honorable Davin G. Smith,
Judge

The Honorable Cynthia Amber,
Senior Judge

Trial Court Cause Nos.
35C01-2102-AD-3, 35C01-2102-
AD-4

Altice, Judge.

Case Summary

- [1] K.D. (Father) appeals the trial court's order that granted the adoption of his twin daughters, P.B. and S.B. (Children), by their maternal grandparents, R.B. and L.B. (Grandparents). Father claims that the trial court erred in concluding that his consent to the adoption was not required.
- [2] Grandparents cross appeal and request an award of appellate attorney fees.
- [3] We affirm.

Facts & Procedural History

- [4] After serving several years in the Indiana Department of Correction (the DOC) for 2013 convictions for Class B felony unlawful possession of a firearm by a serious violent felon (SVF) and Class C felony battery resulting in injury to a pregnant woman (Cause No. 170), Father was released to parole in December 2017. Children were born about a year later, in November 2018, to M.B. (Mother) and Father. Father was present at the birth and signed affidavits establishing paternity. A support order obliging Father to support Children was never entered.
- [5] About two months prior to the birth of Children, Mother had been released from a drug rehabilitation center and moved in with Grandparents. After Children were born, Mother, Father, and Children resided as a family unit for five or six months in the upstairs level of Grandparents' home, while Grandparents resided downstairs. During this time, Father was not employed

but was the primary caretaker for Children while Mother worked. In March or April 2019, Father moved out of Grandparents' home and into his grandmother's home. In April 2019, he began working full time at B&K Root Beer restaurant (B&K), earning \$9.00 per hour.

[6] Mother moved out of Grandparents' home in the summer of 2019, leaving Children with them. After that, Mother would "occasionally" ask to see Children but her contact with them was "not very often" as Grandparents wanted her to be "drugfree to be around the kids." *Transcript Vol. III* at 44. In October 2019, Father violated parole in Cause 170 and, as a result, he was incarcerated from October 20, 2019, through March 29, 2021. During that time, Father had no in-person visits with Children¹ and called Grandparents twice. He earned \$10.00 per month in wages while incarcerated.

[7] Meanwhile, in March 2020, Grandparents petitioned for and received guardianship of Children. On February 1, 2021, Mother died from a drug overdose. On February 12, 2021, Grandparents filed petitions to adopt Children. They asserted that Father's consent to adoption was not required because he failed for a period of one year to communicate with Children when able to do so, failed for a period of one year to provide for the care and support of Children when he was able to do so as required by law or judicial decree, had abandoned Children for a period of at least six months prior to the filing of the

¹ Father noted that, beginning in March 2020, the DOC was not allowing in-person visitors due to COVID-19 and that restriction was still in effect when he was released in March 2021.

petition, and/or was an unfit parent and it was in Children's best interest to dispense with his consent. *Appendix* at 10.

- [8] On March 3, 2021, Father filed motions contesting the adoptions. The trial court set a hearing for April 7, 2021, on the issue of whether Father's consent was required. On March 29, 2021, Father was released from incarceration to parole, moved in with his grandmother, and was re-hired at B&K.
- [9] At the April 7 evidentiary hearing, all parties appeared and presented evidence and testimony. L.B. (Grandmother) testified that in March 2019 they asked Father to move out because they suspected he "had gotten back into drugs," *Id.* at 33. While they would take Children to Father's grandmother's house to visit, Grandmother was not aware of any time Father would have had Children in his sole care. She testified that Father called them twice from prison: once in late summer or early fall of 2020 and once after Mother died in February 2021. Grandmother recalled that Father asked how Children were doing in the first phone call but did not ask about Children during the second call, and in neither call did Father ask to speak to Children. She testified that Father had not sent any gifts, cards, or letters to Children while incarcerated in the DOC. Nor had she received any email communications from him. With regard to financial support, Grandmother testified that Father provided support for the Children before he moved out in spring 2019 but that Father did not provide any financial support thereafter.

[10] Grandmother testified that she and R.B. (Grandfather) had been Children's primary caregivers since spring of 2019 when Mother moved out, they had been married since 1987, she was employed as a registered nurse and had worked in pediatrics for twenty years, they were financially stable, and they desired to adopt Children. Grandfather testified consistently with Grandmother regarding Father's communication with and financial contributions for Children.

[11] Father testified that after he moved out of Grandparents' home in the spring of 2019, he visited with Children regularly for a couple of months but acknowledged that it "dropped off to zero" when Mother was arrested and jailed in summer 2019 for sixty days or so. *Transcript Vol. III* at 103. After Mother was released to house arrest, Father testified that Grandparents did not want him at their residence, and therefore his communication with Children was by phone and video calls via Mother. He said after moving out of Grandparents' home, he would give money to Mother to assist with Children's support, but he did not have any documentation of any payments or contributions.

[12] Father acknowledged that, from his incarceration in October 2019 to the date of the hearing in April 2021, he had had no direct communication with Children. He explained that he maintained contact with Mother, and she "told [him] everything that was going on with the children, even though she did not always have them." *Id.* at 26. Father acknowledged that he called Grandparents on only two occasions and did not speak to Children either time.

- [13] Father did not send any cards to Children, and when asked if he sent letters, he replied “[t]hey were electronic,” although he later testified he did not know Grandparents’ email address. *Id.* at 24, 127. When asked if he had sent gifts, he replied that he had not but had supplied needed items such as diapers via his grandmother or others, who dropped off the items.
- [14] When asked what efforts he made to see Children after his release on March 29, 2021, he stated, “I called yesterday and I was denied visitation.” *Id.* at 26. Father urged that he did not want to lose his parental rights and desired to be the Children’s primary caretaker and provider but understood that there would need to be a transition period so as not to uproot Children and to allow Father to work, save money for several months, and obtain his own residence.
- [15] Father’s grandmother testified that Father was loving with Children and cared for their needs when they would come to her house to visit. After his incarceration, she would call Grandparents to see how Children were doing and ask if they needed any help. She testified that she talked to Father frequently during his incarceration, updated him on Children, and sometimes sent him pictures. She also testified that per Father’s request she would buy and provide “diapers and wipes every month” to Grandparents. *Id.* at 85.
- [16] The court took the matter under advisement, and on June 21, 2021, the court issued findings of fact and conclusions of law determining that Father’s consent was not required. As relevant to our decision, the court’s findings included the following:

26. For the past 12 years, from 11-24-2008 to March 29, 2021, Father has continuously either been on probation, on parole or incarcerated.

27. Father has continuously either been on probation, on parole, or incarcerated during the lifetime of his daughters.

* * *

32. In February or March 2019, Father moved out of Grandparents' residence to reside with his grandmother[.]

* * *

47. Father very rarely saw or communicated with Children when able to do so from March 2019 to October 2019.

48. From March 2019 through October 20, 2019, Father only saw Children if he was at his grandmother's house when Children came to visit her.

* * *

50. From October 20, 2019, through March 29, 2021, while incarcerated, Father sent no cards, letters, or gifts to Children.

* * *

52. While incarcerated from October 20, 2019, through March 29, 2021, Father's grandmother sent him money for phone cards.

* * *

57. From October 20, 2019, through March 29, 2021, while incarcerated, Father did not visit or communicate with Children.

58. Father called one time in 2020 and spoke to Mother.

59. Father called one time in 2021 right after Mother's death and only asked about her death. Father made no inquiries about Children, nor did he speak to Children.

60. Father had access to the Court's contact information but has never taken any court action in either a juvenile paternity case or the Guardianship cases, to establish parenting time rights or child support orders for Children.

61. Father's first request to see Children, after being released from incarceration, was the day before this trial.

62. Father has failed to put Children's needs and priorities above his own.

63. Grandparents have not moved nor changed their telephone numbers since the time Children were born.

64. Grandparents have not undertaken efforts to thwart Father's ability to communicate or send any gifts, monies, cards, or communications to Children.

Appellant's Appendix at 37-39 (cleaned up). The court concluded that Father's consent was not required on the following grounds: (1) Father had abandoned Children for at least six months immediately prior to the filing of the adoption petition; (2) Father failed without justifiable cause to communicate significantly

with Children for at least one year; (3) Father failed to provide care and support for Children for at least one year, despite being able to do so; and (4) Father was an unfit parent and that dispensing with his consent was in Children's best interests.²

[17] Upon Grandparents' motion, the court scheduled the matter for a hearing on the issue of whether the adoption was in Children's best interests. Following the September 15, 2021 hearing, the trial court granted the request and issued Decrees of Adoption of Children. Father now appeals the trial court's determination that his consent was not required for the adoption of Children. Additional facts will be provided as needed.

Discussion & Decision

[18] 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. *Br.S. v. J.N.S.*, 170 N.E.3d 257, 260 (Ind. Ct. App. 2021) (quotations omitted). When reviewing an adoption case, we presume the trial court's decision is correct, and the appellant must rebut this presumption. *Id.* However, to the extent the trial

² The trial court denied Father's request to pursue an interlocutory appeal of the court's decision regarding his consent.

court's ruling is based on an error of law or is not supported by the evidence, it is reversible. *Id.*

[19] We 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. *In re Adoption of S.W.*, 979 N.E.2d 633, 639 (Ind. Ct. App. 2012). We will not disturb the trial court's ruling unless the evidence leads to only one conclusion and the probate court reached an opposite conclusion. *Id.*

[20] Where, as here, the trial court enters findings of fact and conclusions pursuant to Indiana Trial Rule 52(A), we employ a two-tiered standard of review: we must determine whether the evidence supports the findings and whether the findings support the judgment. *Id.* We will not set aside the findings or the judgment unless clearly erroneous. *Id.* Findings of fact are clearly erroneous if the record is devoid of any evidence or reasonable inferences to support them, while a judgment is clearly erroneous when it is unsupported by the findings of fact and the conclusions relying on those findings. *Id.*

I. Father's Consent

[21] Parental consent is generally required to adopt a child in Indiana. *See* Ind. Code § 31-19-9-1. However, consent to adoption 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.

* * *

(11) A parent if:

(A) a petitioner for adoption proves by clear and convincing evidence that the parent is unfit to be a parent; and

(B) the best interests of the child sought to be adopted would be served if the court dispensed with the parent's consent.

I.C § 31-19-9-8(a). Subsection (b) of this statute further provides that “[i]f 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.” I.C § 31-19-9-8(b).

[22] Grandparents had the burden to prove by clear and convincing evidence that Father's consent was not required. *See In re Adoption of T.W.*, 859 N.E.2d 1215,

1217 (Ind. Ct. App. 2006). The provisions of I.C § 31-19-9-8 are disjunctive, and thus any one of them provides independent grounds for dispensing with parental consent. *Id.* at 1218.

Findings of Fact

- [23] In challenging the trial court’s decision that his consent was not required, Father first argues that the court’s decision “relied upon several erroneous factual findings.” *Appellant’s Brief* at 14. Father challenges Findings 44, 47, 48, 58 and 59. We address each in turn.
- [24] In Finding 44, the court found that “[Father] has never been left alone with the children.” *Appellant’s Appendix* at 38. Father argues that from November 2018 to March 2019, he was Children’s primary caregiver, and thus it was “unlikely that Father was never alone with the twins during all that time.” *Appellant’s Brief* at 16. Given that the preceding finding addressed where Father lived when not at Grandparents’ home, i.e., with his grandmother or mother, it appears that the trial court in Finding 44 was referring to the time period *after* Father moved out of Grandparents’ home and before being incarcerated. The evidence established that, during that time, Children were sometimes at Father’s grandmother’s home, but there was no evidence presented that he was ever alone with Children there or anywhere else. Further, even if erroneous, Finding 44 would be cause for reversal only if it was “the sole support for any conclusion of law necessary to sustain the judgment of the court,” which is not the case here. *See In re B.J.*, 879 N.E.2d 7, 20 (Ind. Ct. App. 2008) (disregarding

erroneous finding where it was not the sole support for any conclusion of law necessary to sustain judgment), *trans. denied*.

[25] Father next challenges Findings 47 and 48 that state, respectively, “[Father] very rarely saw or communicated with the children when able to do so from March 2019 to October 2019[,]” and during that same time frame “[Father] only saw the children if he was at his grandmother’s house when the children came to visit her.” *Appendix* at 38. Father argues that, given his testimony that he talked to Children through Mother on the phone and video chat, his communications were not “very rare[.]” as the trial court found, nor did he only communicate with them while they were at his grandmother’s home. We are not persuaded by Father’s claims.

[26] As a threshold matter, the trial court was not required to believe Father’s testimony. Moreover, Grandmother testified that when Mother moved out in late spring or early summer of 2019, Mother’s contact with Children was “not very often” and she only “occasionally” asked to see them. *Transcript Vol. III* at 44. If Mother was not seeing or communicating with Children often in that time period, then neither was Father, other than if he saw them at his grandmother’s. During Mother’s sixty-day period of incarceration that summer, Father admitted that his communication with Children reduced to zero. Then when Mother was on house arrest in August, September, and October 2019, Father testified that he secretly stopped by “a couple of times” and saw them, but mostly he communicated through phone and video calls. *Id.* at 106. On this record, the court reasonably could have considered Father’s

communications infrequent or rare. We do not find that Findings 47 and 48 were clearly erroneous.

[27] Findings 58 and 59 state, respectively, that Father called Grandparents “one time in 2020 and spoke to [Mother,]” and “one time in 2021 right after [Mother’s] death and only asked about her death. [Father] made no inquiries about the children, nor did he speak to the children.” *Appendix* at 38. Father does not dispute that he called Grandparents’ home one time in 2020 and spoke to Mother and that he called Grandparents one time in 2021. His position is that the findings are erroneous because “[t]hey indicate that Father only had one communication in 2020 and 2021 regarding the children” when, according to him, he was in phone contact with Mother on at least a weekly basis “to check up on her and the twins” and also was in contact with her by text message. *Appellant’s Brief* at 18. He asserts that he also inquired about Children “regularly” with his grandmother. *Id.* That Father may have been in contact with Mother or his grandmother and may have asked them about Children, does not render the two findings, which accurately stated that he called Grandparents’ home once in 2020 and once in 2021, clearly erroneous. We find no error in Findings 58 and 59.³

³ We note that Father also challenges Findings 37 and 38, but those address the matter of financial support for Children, and because we affirm the court’s dispensing with Father’s consent on another basis, those two findings are not relevant to our decision today.

Lack of Communication

- [28] Father argues that “the [] court’s legal conclusions were also erroneous.” *Id.* We begin by addressing the court’s conclusion that, for a period of at least one year while Children were in Grandparents’ custody, he failed without justifiable cause to communicate significantly with Children when able to do so. Based on this conclusion, among others, the trial court determined that Father’s consent to the adoption was not required.
- [29] A petitioner seeking to adopt without parental consent has the burden of proving both a lack of communication for the statutory period and that the ability to communicate during that time period existed. I.C § 31-19-9-8(a)(2)(A); *In re Adoption of C.E.N.*, 847 N.E.2d 267, 271 (Ind. Ct. App. 2006). The purpose of the provision dispensing with consent if the parent “fail[ed] without justifiable cause to communicate significantly with the child when able to do so” is to encourage non-custodial parents to maintain communication with their children and to discourage them from visiting their children just often enough to thwart the adoptive parents’ efforts to provide a settled environment for the children. *Id.* at 272. The level of communication must be significant and more than “token efforts” by the parent. *Id.*
- [30] In this case, Children were born in November 2018, and Father moved out of Grandparents’ home in March 2019. He claims that between April 2019 and his incarceration on October 20, 2019, he visited with Children either through Mother or when they came to his grandmother’s house. Even taking Father’s claims as true, there is no dispute that Father had no communication with

Children since his incarceration in October 2019 through April 2021. He suggests that his lack of communication was justifiable due to the COVID-19 pandemic, which prevented in-person visits with Children; however, there is no evidence of visits, or even of requests for visits, in the approximately five months before the March 2020 onset of the pandemic.

[31] Furthermore, it is undisputed that, during his seventeen-month period of incarceration, Father called Grandparents twice, and only during the first phone call did he ask about Children. He did not speak with Children during either call. Father suggests that he pursued “other reasonable means of communication about the twins,” by “regular phone calls and messages to Mother and to his grandmother,” but again this is based on his testimony, which is evidence not favorable to the trial court’s judgment and, further, does not rectify a lack of communication with – not just about – Children.

Appellant’s Brief at 21.

[32] To the extent that Father suggests that his imprisonment made him unable to communicate with Children because they were young, our court has observed that those who “pursue criminal activity run the risk of being denied the opportunity to develop positive and meaningful relationships with their children.” *In re Adoption of H.N.P.G.*, 878 N.E.2d 900, 907 (Ind. Ct. App. 2008), *trans. denied, cert. denied*. Although we “would not necessarily hold an incarcerated parent to the same standard as a non-incarcerated parent when it comes to determining whether that parent’s communication with his or her child were significant,” *In re S.W.*, 979 N.E.2d at 642 n.4, the evidence here

demonstrates that Father made no effort to directly communicate with Children – for instance, by calling Grandparents to talk to Children or sending Children cards, letters, or gifts – since October 2019.

[33] In sum, Father’s arguments ask us both to consider evidence that does not favor the trial court’s decision, which we cannot do, and to find that his claimed calls and messages from prison with Mother and his grandmother, during which he would ask about Children, constitute significant communications by him with Children. Such inquiries made to a third-party do not establish that *he* communicated significantly with Children. Accordingly, we find no error with the trial court’s decision that Father’s consent was not required for Grandparents’ adoption of Children.⁴

II. Appellate Attorney’s Fees

[34] Grandparents cross appeal and assert that they are entitled to an award of appellate attorney’s fees because Father’s appeal “is frivolous, without merit, and was brought to harass and annoy [] Grandparents and intentionally delay the permanency needed, desired and required by the Children.” *Appellee’s Brief* at 14. Pursuant to Ind. Appellate Rule 66(E), this Court in its discretion may award appellate attorney’s fees “if the appeal, petition, or motion, or response,

⁴ We recognize that the trial court also found that (1) Father abandoned or deserted Children for at least six months prior to the filing of the adoption petition; (2) Father failed, for at least one year while Children were in Grandparents’ custody, to provide for the care and support of Children when able to do so; and (3) Father was unfit to be a parent and that Children’s best interests would be served if the court dispensed with Father’s consent. *See* I.C. § 31-19-9-8(a)(1), (2)(b), (11). Because I.C. § 31-19-9-8 is written in the disjunctive, we need not reach these other bases for dispensing with Father’s consent to the adoption.

is frivolous or in bad faith.” Our discretion is limited to circumstances where the appeal is “permeated with meritlessness, bad faith, frivolity, harassment, vexatiousness, or purpose of delay.” *Thacker v. Wentzel*, 797 N.E.2d 342, 346 (Ind. Ct. App. 2003). “A strong showing is required to justify an award of appellate damages, and the sanction is not imposed to punish mere lack of merit, but something more egregious.” *Picket Fence Prop. Co. v. Davis*, 109 N.E.3d 1021, 1033 (Ind. Ct. App. 2018), *trans. denied*. “In general, we are cautious to award attorney fees because of the potentially chilling effect the award may have upon the exercise of the right to appeal.” *Holland v. Steele*, 961 N.E.2d 516, 529 (Ind. Ct. App. 2012), *trans. denied*.

[35] Indiana appellate courts have formally categorized claims for appellate attorney fees into “procedural” and “substantive” bad faith claims. *Picket Fence Prop. Co.*, 109 N.E.3d at 1033. Here, Grandparents argue that an award of appellate attorney’s fees is warranted based on substantive failures. “To prevail on a substantive bad faith claim, a party must show that the appellant’s contentions and arguments are utterly devoid of all plausibility.” *Staff Source, LLC v. Wallace*, 143 N.E.3d 996, 1012 (Ind. Ct. App. 2020).

[36] We cannot say that Father’s claims are utterly devoid of all plausibility. He presented colorable arguments concerning his communications with Children and as to financial assistance he claimed to have made, either on his own or through his grandmother, of in-kind financial contributions, such as diapers, food, toys, or clothes. Given the record before us, we conclude that an award of appellate attorney’s fees is not warranted in this case.

[37] Judgment affirmed.

Bailey, J. and Mathias, J., concur.