MEMORANDUM DECISION

ATTORNEY FOR APPELLANT

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IN THE COURT OF APPEALS OF INDIANA

A.J.,

Appellant-Respondent,

v.

M.W.,

Appellee-Petitioner.

February 19, 2021

Court of Appeals Case No. 19A-AD-2726

Appeal from the Starke Circuit Court

The Honorable Kim E. Hall, Judge

Trial Court Cause No. 75C01-1807-AD-15

Bradford, Chief Judge.

Case Summary

[1] A.J. ("Biological Father") appeals the trial court's determination that his consent to his child's adoption by the child's stepfather was not necessary pursuant to Indiana Code section 31-19-9-8. The trial court found, *inter alia*, that Biological Father's consent was not necessary because Biological Father had failed, without justifiable cause, to communicate significantly with the child despite being able to do so. We affirm.

Facts and Procedural History

[2] Biological Father and R.W. ("Mother") are the biological parents of S.M.J. ("Child"), who was born on October 18, 2011. On July 17, 2018, M.W. ("Adoptive Father") filed a petition to adopt Child.[1] Mother, who is married to Adoptive Father, consented to the adoption. Adoptive Father alleged that Biological Father "has only had two separate parenting time sessions with [Child] in the last 2½ years and has failed to have significant communication with [Child] therefore, pursuant to [Indiana Code section] 31-19-9-8, [Biological Father's] consent is not required." Appellant's App. Vol. II p. 11.

[3] On October 24, 2018, the trial court issued an amended adoption decree, in which it found that Biological Father had "not had meaningful or substantial

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[1] Notice was initially given by way of publication in the local daily newspaper on three separate dates in September of 2018, and Biological Father's counsel in an unrelated criminal matter was later provided with copies of the adoption petition.

contact with [Child] for over a one year period prior to the filing of the Petition for Adoption even though he was able to do so." Appellant's App. Vol. II p. 17. Biological Father subsequently sent a letter to the trial court, challenging the adoption decree, claiming insufficient notice and that his consent to the adoption was necessary but not given.[2] Treating Biological Father's letter as a motion to correct error, the trial court scheduled a hearing.

[4] The trial court conducted an evidentiary hearing on Biological Father's motion on October 29, 2019, during which the parties presented evidence and arguments relating to the question of whether Biological Father's consent was necessary. Adoptive Father testified regarding the lack of communication between Biological Father and Child. Specifically, Adoptive Father testified as follows:

> Q: And, in the past 12 months, [h]as [Biological Father] been over to your home to visit with [Child]?
> A: No.
> Q: Has he -- have you received any mail from [Biological Father], addressed to [Child]?
> A: That, I honestly don't know. I believe he had sent a birthday card a couple of years ago.
> Q: When is [Child's] birthday?
> A: It would be October 18th.
> Q: Did you receive a birthday card from -- did [Child] receive a birthday card from [Biological Father]?
> A: No.

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[2] While the photographic quality of the copy of the letter included in Biological Father's appendix is so poor that its contents are nearly impossible to read, we are able to garner Biological's Father's claims from a journal entry added into the record by the trial court.

Q: What about any other written communication, in the past 12 months?
A: Not that I'm aware of.
Q: When's the last time you're aware of [Biological Father] visiting with [Child]?
A: I believe, I want to say it was around Christmas of last year.
Q: Of 2018?
A: Or 2017, yeah, it was Christmas of 2017.

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Q: Have you received any phone calls from [Biological Father], in the past 12 months, that you're aware of?
A: Not that I'm aware of.
Q: What about in the past four months?
A: Not that I'm aware of.

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Q: And, have you ever discouraged [Child] from speaking to her father or seeing her father?
A: No, I have not.
Q: And, since you've been in [Child's] life, how would you characterize her relationship with [Biological Father]?
A: Extremely absent. I mean, of course, she would want to hear from him, but there were many occasions that I remember that he was supposed to call. He never did, and she was, of course, upset. Or, he was supposed to pick her up and he never did, and again, she was upset. I've seen her be extremely heartbroken and upset over that circumstance, many times.
Q: Has your or your wife's phone number changed in the past 12 months?
A: No.
Q: Has it changed in the past 24 months?
A: No.

Tr. Vol. II pp. 27–29. Adoptive Father additionally testified that in the twenty-four months leading up to the evidentiary hearing, he had not seen Biological Father be a part of Child's life. He further testified that while Biological Father has not been a part of Child's life, both paternal grandmother and paternal great-aunt have consistently been a part of Child's life, but that neither has mentioned Biological Father trying to contact Child.

[5] Biological Father also testified about his contact with Child, testifying as follows:

> Q: And, where have you been on her past two birthdays?
> A: Incarcerated, well, I was incarcerated for this last one and the one before that, I was at [his girlfriend's] house.
> Q: And, since you've been incarcerated, since November of 2018, have you written [Child]?
> A: Yes.
> Q: How often have you written her, or wrote her?
> A: Half a dozen times.
> Q: And, where do you mail those letters to?
> A: Either to my aunt or my mother.
> Q: Never directly to [Child's] residence?
> A: No. I don't have their address.
> Q: Have you ever asked your mother or aunt for the address?
> A: I have.
> Q: In 2018, when did you visit with [Child]?
> A: I seen her in early March. That's the only time I got to see her last year.
> Q: What did that visit consist of?
> A: My mom drove and we took her with, down to Kokomo, to see my son whose birthday had just passed. And we went to -- it was a Texas Corral in Kokomo and to the park.
> Q: When your mom picked [Child] up, were you with your

mother?
A: No, I wasn't with them.

Tr. Vol. II pp. 39–40. Prior to March of 2018, Biological Father saw Child for two hours on Christmas in 2017. Biological Father acknowledges that he has never attended any of Child's school events or her birthday parties. He further acknowledged that he had not paid any child support since March of 2018 and, at the time of the hearing, was more than $8000 in arrears.

[6] In response to Biological Father's testimony regarding his last two visits with Child, Adoptive Father's counsel argued that

> the two visits that [Biological Father] has had in the past 24 months with his minor child have not been significant by -- significant or substantial, by any stretch of the imagination and that they have, one, been short and, two, been centered around other holidays or other family gatherings where a number of other family members were present, including members that the mother and step-father allow the daughter to be around, on a regular basis.

Tr. Vol. II p. 61. Adoptive Father's counsel further argued,

> I think the evidence here shows that, not only is [Biological Father] an unfit parent, and that it is in [Child's] best interest that the adoption proceed, because a child at her age, for this to change her future, needs stability, and that's what [Adoptive Father and Mother] have offered this child, for the previous four years and are more than willing and capable and able to do so for the remaining of her time.

Tr. Vol. II p. 61. The trial court then took the matter under advisement and, on November 6, 2019, the trial court issued an order in which it found that Biological Father's consent to the adoption was not necessary.

Discussion and Decision

[7] Biological Father contends that the trial court erred in determining that his consent to the adoption was not necessary.

> "When reviewing adoption proceedings, we presume that the trial court's decision is correct, and the appellant bears the burden of rebutting this presumption." *In re Adoption of J.L.J. and J.D.J.*, 4 N.E.3d 1189, 1194 (Ind. Ct. App. 2014) (citation omitted), *trans. denied*. We generally give 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." *MacLafferty v. MacLafferty*, 829 N.E.2d 938, 940 (Ind. 2005). We will not disturb the trial court's ruling "unless the evidence leads to but one conclusion and the trial judge reached an opposite conclusion." *Rust v. Lawson*, 714 N.E.2d 769, 771 (Ind. Ct. App. 1999) (citation omitted), *trans. denied*. The trial court's findings and judgment will be set aside only if they are clearly erroneous. *In re Paternity of K.I.*, 903 N.E.2d 453, 457 (Ind. 2009). "A judgment is clearly erroneous when there is no evidence supporting the findings or the findings fail to support the judgment." *Id.* "We will neither reweigh the evidence nor assess the credibility of witnesses, and we will examine only the evidence most favorable to the trial court's decision." *In re Adoption of A.M.*, 930 N.E.2d 613, 616 (Ind. Ct. App. 2010).

In re Adoption of O.R., 16 N.E.3d 965, 972–73 (Ind. 2014).

[8] "Generally, a trial court may only grant a petition to adopt a child born out of wedlock who is less than eighteen years of age if both '[t]he mother of [the] child' and 'the father of [the] child whose paternity has been established' consent to the adoption. *Id.* at 973 (quoting Ind. Code § 31-19-9-1(a)(2)) (brackets in original). However, Indiana Code section 31-19-9-8(a) provides that consent to an adoption is not required from, among others, 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.
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> (2) A parent of a child in the custody of another person if for a period of at least one (1) year the parent:
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> (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.
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> (11) A parent if:
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> (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.

In this case, the trial court found that each of the foregoing statutory provisions applied to Biological Father. Father challenges the trial court's findings with respect to each of the quoted provisions. "However, the statute is written in the disjunctive such that the existence of any one of the circumstances provides sufficient ground to dispense with consent." *In re O.R.*, 16 N.E.3d at 973 (citing *In re Adoption of D.C.*, 928 N.E.2d 602, 606 (Ind. Ct. App. 2010), *trans. denied*).

[9] We conclude that the evidence supports the trial court's determination that Biological Father, knowing that Child was in the custody of another person for a period of at least one year, failed, without justifiable cause, to communicate significantly with Child despite having the ability to do so. *See* Ind. Code § 31-19-9-8(a)(2). Biological Father testified that prior to 2015, he had had regular contact with Child. However, Biological Father's own testimony indicates that he only saw Child "a couple of times" in 2015, had only occasional contact with Child via Facebook video in 2016, and only saw Child for two hours on Christmas in 2017. Tr. Vol. II p. 50. Further, he only saw Child once in March of 2018, and had not seen Child since the 2018 visit, which occurred in the presence of paternal grandmother. Biological Father claimed to have had a few brief telephone conversations with Child while she was at paternal great-aunt's home but failed to provide any specifics regarding the length or frequency of such calls. Further, while Biological Father claims to have written approximately a half-dozen letters to Child, nothing in the record indicates that Child ever received any letters from Biological Father and the trial court, acting as the factfinder, was under no obligation to believe Father's self-serving

testimony in this regard. *See Thompson v. State*, 804 N.E.2d 1146, 1149 (Ind. 2004) ("As a general rule, factfinders are not required to believe a witness's testimony even when it is uncontradicted."). Thus, based on Biological Father's own testimony, despite having the ability to contact Child, he has not had regular or frequent contact with Child since prior to 2015.

[10] The trial court determined that Biological Father's efforts to communicate with Child did not warrant significant communication. We cannot say that the trial court's determination in this regard was clearly erroneous. Biological Father's arguments on appeal effectively amount to an invitation to reweigh the evidence, which we will not do. *See In re O.R.*, 16 N.E.3d at 973. Furthermore, because we conclude the trial court properly relied on at least one statutory provision—namely, that for a period of at least one year Biological Father failed without justifiable cause to communicate significantly with Child although he was able to do so—we do not address other provisions on which the trial court may also have relied. *See id*.

[11] The judgment of the trial court is affirmed.

Kirsch, J., and May, J., concur.