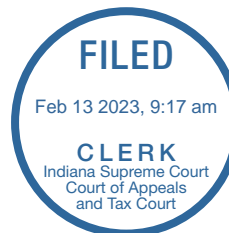


MEMORANDUM DECISION

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 Appellate Rule 65(D), this Memorandum Decision is not binding precedent for any court and may be cited only for persuasive value or to establish res judicata, collateral estoppel, or law of the case.



ATTORNEY FOR APPELLANT

J. David Agnew
Lorch Naville Ward LLC
New Albany, Indiana

IN THE COURT OF APPEALS OF INDIANA

In the Matter of the Adoption of
I.M. and R.M., Minor Children,
T.M.,
Appellant-Respondent,

v.

A.M. and Z.K.,
Appellees-Petitioners.

February 13, 2023

Court of Appeals Case No.
22A-AD-1623

Appeal from the
Vanderburgh Superior Court

The Honorable
Renée A. Ferguson, Magistrate

Trial Court Cause Nos.
82D04-2011-AD-156
82D04-2011-AD-157

Memorandum Decision by Judge Foley
Judges Robb and Mathias concur.

Foley, Judge.

- [1] T.M. (“Father”) appeals the trial court’s decree of adoption, which granted the petition—filed by Z.K. (“Stepfather”)—to adopt minor children, I.M. and R.M.

(“the Children”). Father raises the following restated issue for our review: whether the trial court erred in concluding that Father’s consent to the adoption was not required because of his failure to significantly communicate with the Children and his failure to provide for the care and support of the Children. Because we conclude that the trial court did not err in its order, we affirm.

Facts and Procedural History

- [2] Father and A.M. (“Mother”) are the biological parents of I.M. and R.M. Mother and Father began dating in 2008, and, after a few months, they moved in together. R.M. was born on October 10, 2010, and I.M. was born on November 19, 2012. The relationship between Mother and Father began deteriorating in 2016 partly due to Father being gone for lengthy periods of time on trips to Michigan, leaving Mother and the Children at home. Mother and Father were never married but lived together until spring 2017.
- [3] On June 22, 2017, Father filed pleadings initiating paternity actions for the Children that were entitled “Verified Information for Contempt.”¹ Appellant’s App. Vol. 2 pp. 36–41. In those pleadings, Father alleged that Mother had prevented him from seeing the Children for seven weeks. At the hearing on the petitions, the trial court found that “[w]hile . . . Mother should not have

¹ Father’s paternity of the Children was established by paternity affidavit. The paternity proceedings were originally filed under two separate cause numbers, 82D06-1706-JP-896 and 82D06-1706-JP-897, which were later consolidated under 82D06-1706-JP-896 pursuant to Indiana Trial Rule 81.8(H). Further, the paternity proceedings were later consolidated under the adoption cause numbers, 82D04-2011-AD-156 and 82D04-2011-AD-157, pursuant to Indiana Code section 31-19-2-14(a).

restricted . . . Father's parenting time . . . [,] the Court cannot find her in contempt giving [sic] the circumstances of the parties' relationship" and granted Father parenting time. *Id.* at 4.

- [4] In an agreed entry to the trial court dated December 15, 2017, Mother and Father agreed to continue to share joint legal custody of the Children. Mother was given primary physical custody of the Children, and Father was given parenting time pursuant to the Indiana Parenting Time Guidelines. Father was ordered to pay child support weekly in the amount of twenty-five dollars per child, for a total of fifty dollars per week.
- [5] On July 16, 2018, Mother filed a petition to modify Father's parenting time based on inappropriate behavior of Father when he had visitation with the Children and stating that she believed that it was in the Children's best interests that Father's parenting time be supervised. On August 26, 2018, Father filed another petition to find Mother in contempt, alleging that she was not complying with the agreed entry and was not allowing him to exercise his parenting time.
- [6] On September 12, 2018, the trial court in the paternity case ordered that Father was to submit to a hair follicle test for controlled substances. The trial court indicated that if Father was negative for drugs, he would have parenting time pursuant to the Indiana Parenting Time Guidelines, but if he was positive for anything other than marijuana, his parenting time would need to be supervised.

On the same date, T.M. submitted to a hair follicle test and was positive for amphetamines, MDMA, cocaine, and marijuana.

- [7] After testing positive for these drugs, Father never sought supervised parenting time with the Children and did not contact the Parenting Time Center to set up supervised parenting time with the Children. On December 3, 2019, Father filed another petition to find Mother in contempt and alleging that Father had made various attempts to “obtain cooperation from . . . Mother to exercise his parenting time, to no avail.” *Id.* at 47–48. In his petition, Father alleged he was clean as evidenced by a hair follicle test submitted with the petition and taken on October 30, 2019, and requested his parenting time be restored to unsupervised.
- [8] From September 2018 until the date of the hearing, Father did not send any written correspondence such as letters or cards to the Children. Nor did he call or send any gifts to the Children during holidays or birthdays during the same time period. Father also failed to make any child support payments for the Children from April 2019 until August 2020.
- [9] On September 25, 2017, Mother married Stepfather, and Stepfather moved into the home with the Children. The Children have resided with Stepfather and Mother continuously since September 2017. On November 20, 2020, Stepfather filed his petition seeking to adopt the Children and alleging that Father’s consent to the adoption was not required under Indiana Code section 31-19-9-8(1), (2), and (11), because Father had abandoned the Children for at

least six months prior to the filing, Father had, for a least one year prior to the filing, failed to communicate significantly with the Children without justifiable cause or had failed to knowingly provide for the care and support of the Children when able to do so, and Father was unfit to be a parent, and the best interests of the Children would be served if Father's consent was not required. Father filed an objection to Stepfather's petition for adoption on December 22, 2020.

[10] On April 25, 2022, an evidentiary hearing was held on Stepfather's adoption petition. On June 16, 2022, the trial court issued its Findings of Fact and Conclusions of Law, finding that Father's consent was not required for the adoption and that the adoption was in the best interests of the Children. Father now appeals.

Discussion and Decision

[11] Stepfather has failed to file an appellees' brief, and therefore we will not undertake the burden of developing arguments for him. *Jenkins v. Jenkins*, 17 N.E.3d 350, 351 (Ind. Ct. App. 2014). Instead, we apply a less stringent standard of review and will reverse upon a showing of prima facie error, which is error "at first sight, on first appearance, or on the face of it." *Orlich v. Orlich*, 859 N.E.2d 671, 673 (Ind. Ct. App. 2006). To determine whether reversal is required, we are still obligated to correctly apply the law to the facts in the record. *Jenkins*, 17 N.E.3d at 352.

[12] Father argues that the trial court erred when it determined that his consent was not necessary for Stepfather's adoption of the Children to proceed. When reviewing a trial court's ruling in an adoption case, the appellant bears the burden of overcoming the presumption that the trial court's decision is correct. *In re Adoption of S.W.*, 979 N.E.2d 633, 639 (Ind. Ct. App. 2012). When reviewing a trial court's ruling in an adoption proceeding, we will not disturb that ruling unless the evidence leads to but one conclusion and the trial court reached an opposite conclusion. *In re Adoption of T.L.*, 4 N.E.3d 658, 662 (Ind. 2014). We presume that the trial court's decision is correct, and we consider the evidence in the light most favorable to the decision. *Id.*

[13] Parental consent is generally required to adopt a child in Indiana. Ind. Code § 31-19-9-1. However, consent to adoption is not required from:

(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.

I.C. § 31-19-9-8(a)(1), (2). “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.” I.C. § 31-19-9-8(b). The petitioner who is seeking to adopt must prove this statutory criterion is satisfied by clear and convincing evidence.² *In re Adoption of T.L.*, 4 N.E.3d at 662 (citing *In re Adoption of M.A.S.*, 815 N.E.2d 216, 220 (Ind. Ct. App. 2004)).

[14] Here, the trial court found that there was clear and convincing evidence that Father abandoned the Children, that he failed to communicate significantly with the Children without justifiable cause for at least one year, and that he voluntarily failed to contribute to the Children’s support. Appellant’s App. Vol. 2 pp. 5–6. Father argues that the trial court erred in finding that he had failed, without justifiable cause, to communicate significantly with the Children while able to do so from September of 2018 until May of 2022, and that he had knowingly failed to pay child support from April of 2019 until August of 2020. Because Indiana Code section 31-19-9-8(a) only requires that one of the statutory criteria be proven, and because we find that the criterion that Father failed to significantly communicate with the Children without justifiable cause

² We note that, in his brief, Father states that, “a petitioner seeking to adopt a child over the objection of a natural parent must prove his case by ‘clear, cogent and *indubitable* evidence,’” citing to *In re Petition for Adoption of Augustyniak*, 505 N.E.2d 868, 870 (Ind. Ct. App. 1987). Appellant’s Br. p. 12 (emphasis added). However, in *In re Adoption of M.A.S.*, 815 N.E.2d 216 (Ind. Ct. App. 2004), this court held that the burden of proof for an adoption without consent, under any of the subsections in section 31-19-9-8, is that of “clear and convincing evidence.” 815 N.E.2d at 220.

for at least one year was proven by clear and convincing evidence, we do not reach Father's other argument.

[15] The evidence presented at the hearing established that between September 12, 2018, when Father tested positive for several different drugs, which necessitated that his parenting time be supervised, and the date of the hearing in April 2022, Father only made one indirect attempt to contact the Children when he sent a police officer to Mother's house, in December 2019, to try to get visitation. After testing positive for drugs in September 2018, and the issuance of the trial court's order mandating supervised parenting time, Father failed to contact the Parenting Time Center to set up supervised parenting time with the Children and never attempted to execute his supervised parenting time in any manner with the Children. From September 2018 until the date of the hearing, Father never sent any written correspondence, such as letters or cards to the Children, and never called or sent any gifts to the Children during holidays or their birthdays during the same time period. Mother lived in the same home and had the same phone number from September 2018 until August 2021 when she moved to Kentucky. Father also failed to make any child support payments for the Children from April 2019 until August 2020.

[16] Father maintains that the trial court's conclusion was incorrect because the evidence showed that in the three years prior to the adoption petition, Father filed four separate contempt motions seeking to be granted visitation with the Children. However, first, only one of those petitions was filed during the

pertinent time period, between September 2018 and April 2022.³ Second, this argument by Father fails to acknowledge his failure to avail himself of the court ordered supervised visitation, and is a request to reweigh the evidence, which we cannot do. *See In re Adoption of S.W.*, 979 N.E.2d at 639. The evidence showed that Father did not communicate significantly with the Children for at least one year in that he did not ever attempt to set up supervised visitation, did not call or write any letters, and did not send any correspondence or gifts during the time period of September 2018 and April 2022.

[17] The evidence was sufficient to support the trial court's conclusion that Father failed without justifiable cause to communicate significantly with the Children for a period of at least one year. We, therefore, conclude that the trial court did not err in holding that Father's consent was not necessary for the adoption of the Children by Stepfather to proceed.

[18] Affirmed.

Robb, J., and Mathias, J., concur.

³ The record reflects that the contempt petitions were filed on June 22, 2017, August 9, 2017, August 26, 2018, and December 5, 2019.