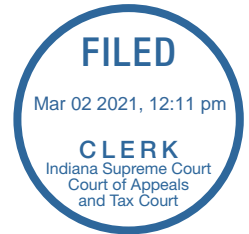




IN THE
Indiana Supreme Court

Supreme Court Case No. 21S-AD-90



In the Matter of the Adoption of I.B. (Minor Child):

J.P.

Appellant (Respondent below),

–v–

V.B.

Appellee (Petitioner below).

Decided: March 2, 2021

Appeal from the Hamilton Superior Court,

No. 29D06-1907-AD-1089

The Honorable Gail Bardach, Judge

On Petition to Transfer from the Indiana Court of Appeals,

No. 20A-AD-229

Opinion by Justice Goff

Chief Justice Rush and Justices David, Massa, and Slaughter concur.

Goff, Justice.

An adoption is a creature of paradox: it cements one relationship while it terminates another. To facilitate this shift, the legislature has provided the courts with standards by which to protect the rights of natural parents and the best interests of the children involved. Specifically, the natural parents must consent to the adoption. But in certain cases, such as this one, trial courts may, by statute, dispense with that consent requirement. Here, J.P., the biological mother (Mother), appealed the trial court's finding that her consent was not required for the adoption of her child because, for a period of one year, she failed to communicate significantly with her child and failed to support her child when able and required to do so. Because we find that the trial court's determinations were supported by sufficient evidence, we affirm its ruling.

Facts and Procedural History

In 2010, Mother gave birth to I.B. (Child). Mother and Child's father (Father) divorced in 2014. Mother was awarded legal and physical custody of Child with parenting time to Father. After Mother began to struggle with drug use, Father moved for emergency modification of custody. The trial court granted legal and physical custody to Father, ordered supervised parenting time for Mother, and ordered that Mother pay child support. While Mother exercised supervised parenting time with one of her other children, she didn't exercise her right to parenting time with Child. Nor did she pay any of the court-ordered child support.

In 2019, Father's wife, V.B. (Stepmother), petitioned for stepparent adoption with the consent of Father. In the petition, Stepmother alleged that Mother's consent was unnecessary because she had failed to pay child support for more than a year, failed to significantly communicate with Child for more than a year, had abandoned Child, and was unfit. Mother filed a letter contesting the adoption. The trial court held an adoption hearing. At the hearing, Mother testified that, while she had not visited Child, she was in constant contact with her. Mother also testified that she did exercise supervised parenting time with one of her other children.

Father testified that Mother's only contact with Child was phone communication that averaged thirteen minutes per month. The hearing also revealed that, while Mother earned little money and spent time in jail during the relevant year, she had some income and few expenses. Nevertheless, the evidence disclosed that Mother never paid any child support. After the hearing, the trial court granted Stepmother's petition for adoption, finding Mother's consent unnecessary because she had failed to pay child support for more than a year, failed to significantly communicate with Child for more than a year, and had abandoned Child. Because the trial court found that those three grounds dispensed with the need for Mother's consent, the court made no finding as to Mother's unfitness.

Mother appealed. The Court of Appeals reversed, finding that Stepmother did not provide clear and convincing evidence (1) that Mother failed to significantly communicate with Child for one year without justification, or (2) that Mother failed to pay child support for one year when able to do so. *Matter of Adoption of I.B.*, 151 N.E.3d 774, 781–82 (Ind. Ct. App. 2020). The panel also found that Stepmother failed to show that Mother had abandoned Child for the six-month period preceding the petition. *Id.* The panel held that the trial court erred in its failure-to-significantly-communicate determination by relying on phone records not admitted into evidence and “placing complete emphasis” on Father's testimony about the average number of minutes that Mother spoke with Child per month. *Id.* at 779. The panel also determined that the trial court erred in its failure-to-support analysis because there was no evidence that Mother could pay child support after covering her necessary living expenses. *Id.* at 781.

Stepmother petitioned to transfer, which we now grant, vacating the Court of Appeals opinion. *See* Ind. Appellate Rule 58(A).

Standards of Review

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.” *E.B.F. v. D.F.*, 93 N.E.3d 759, 762 (Ind. 2018) (cleaned up). So, “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.” *Id.* And we will not disturb that decision “unless the evidence leads to but one conclusion and the trial judge reached an opposite conclusion.” *In re Adoption of T.L.*, 4 N.E.3d 658, 662 (Ind. 2014). “We will not reweigh evidence or assess the credibility of witnesses.” *E.B.F.*, 93 N.E.3d at 762 (citation omitted). “Rather, we examine the evidence in the light most favorable to the trial court’s decision.” *Id.* (citation omitted).

Discussion and Decision

In this case, we confront the limited question of whether the trial court committed clear error when it determined that Mother failed for one year to (1) significantly communicate with Child without justification, or (2) support Child when able to do so and required by law. We find that ample evidence supports both determinations and that the trial court did not err in granting Stepmother’s petition for adoption.

I. Parental consent to adoption is usually, but not always, required.

A natural parent enjoys special protection in any adoption proceeding, and courts strictly construe our adoption statutes to preserve the fundamentally important parent-child relationship. *In re Adoption of N.W.*, 933 N.E.2d 909, 913 (Ind. Ct. App. 2010). But “even the status of a natural parent, though a material consideration, is not one which will void all others.” *Id.* And “under carefully enumerated circumstances,” the adoption statutes allow “the trial court to dispense with parental consent and allow adoption of the child.” *Id.* See Ind. Code ch. 31-19-9 (the Consent-to-Adoption Statute).

Three of these circumstances are at issue here: Consent from the natural parent is not required “if the child is adjudged to have been abandoned or deserted” for six months or more “immediately preceding the date of the filing of the petition for adoption,” or if, for at least one year, the parent “fails without justifiable cause to communicate significantly with the child when able to do so” or “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 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. I.C. § 31-19-10-1.2(a). The party bearing this burden must prove his or her case by clear and convincing evidence. I.C. § 31-19-10-0.5. Indiana Code section 31-19-9-8(a) is written in the disjunctive, so each of the sub-sections provides an independent ground for dispensing with consent. *In re Adoption of T.W.*, 859 N.E.2d 1215, 1218 (Ind. Ct. App. 2006).

Courts have struggled with determining what constitutes significant communication and when a parent is able to support their child. But three recent decisions from this Court help guide our decision here. In the latest, *E.B.F.*, we reversed and remanded a trial court’s order granting the stepmother’s petition for adoption. 93 N.E.3d at 767. In that case, the mother and father had a child together out of wedlock. *Id.* at 761. The mother, who had suffered abuse at the hands of the father, retained primary custody of the child for the first ten years of the child’s life. *Id.* When the child was ten, however, mother’s life became less stable: she was unemployed, struggled with substance abuse, and was in a different abusive relationship. *Id.* As these problems escalated, the parents agreed to joint legal custody, father’s primary custody, and parenting time for mother “at such times and upon such conditions as the parties are able to mutually agree.” *Id.* Mother spent meaningful time with the child on Christmas Day in 2013 but had no further meaningful contact with the child after that date. *Id.* Mother spent 2014 in recovery and, by the end of the year, she “had left her abusive partner, gained stable employment, found decent housing, and successfully addressed her drug dependency.”

Id. Just over a year after mother's last significant contact with the child, the stepmother petitioned for adoption. *Id.* at 762. Father consented and the trial court found that mother's consent wasn't required because she had failed to communicate significantly with the child for at least one year. *Id.* The trial court ultimately granted stepmother's petition for adoption. *Id.* This Court reversed, finding that mother's ongoing battle with addiction and good-faith effort at recovery constituted justifiable cause for failure to communicate significantly with the child. *Id.* at 765.

We addressed a similar issue in *In re Adoption of O.R.*, 16 N.E.3d 965 (Ind. 2014). At four months old, the child in that case, who had been born out of wedlock, was placed in foster care with her adoptive parents. *Id.* at 968. The child lived with her adoptive parents most of her life, except for approximately one year, when she lived with her biological parents. *Id.* During this time, the adoptive parents regularly visited the child. *Id.* In 2008, the father asked the adoptive parents to assume guardianship of the child. *Id.* Though the father changed his mind, the trial court awarded the adoptive parents permanent guardianship. *Id.* In 2009, the father began serving a seven-year prison sentence. *Id.* While incarcerated, the father sent no mail to the child and called her only once. *Id.* at 973–74. Three years later, the adoptive parents petitioned for adoption. *Id.* at 968. The mother consented, but the father refused. *Id.* The trial court granted the petition for adoption, finding that the father's consent wasn't necessary. *Id.* This Court affirmed, finding that the father's incarceration wasn't justifiable cause for his failure to communicate with the child for over a year. *Id.* at 974. While the father might not have had the child's address to send mail, we reasoned, he failed to investigate other reasonable means of communicating with his child. *Id.*

The same year we decided *O.R.*, we addressed the failure-to-support issue in *In re T.L.* The mother and father in that case shared two children, and the mother had physical custody of both children. 4 N.E.3d at 660. Father had a child-support order, but for over nine years, he had only paid \$390 in child support. *Id.* The father was incarcerated for much of that time, and he was unemployed while he was free. *Id.* When the mother married the stepfather, he petitioned to adopt the children. *Id.* The father refused consent. *Id.* But the trial court granted the petition for adoption,

finding that the father had knowingly failed to care for and support the children when able to do so. *Id.* at 660–61. This Court affirmed, rejecting the father’s argument that he couldn’t pay. *Id.* at 663. Father wasn’t imprisoned until two years after the court ordered him to pay child support, we reasoned, and he was able to pay at least some support while incarcerated but chose not to do so. *Id.*

These cases reiterate a familiar theme. A parent who meets society’s expectations by maintaining a connection with her child and by financially supporting her child cannot have her legal relationship with the child severed without her consent. Conversely, when a parent fails to maintain a meaningful relationship with, or fails to financially support, that child, she loses her right as a natural parent to withhold consent to adoption. Of course, what constitutes failure is a fact-intensive inquiry. And so, we now turn our attention to the evidence here.

II. Sufficient evidence supports the trial court’s decision.

A. There was sufficient evidence that Mother failed to communicate significantly with Child without justifiable cause for at least one year.

The trial court found that Mother failed to communicate significantly with Child without justifiable cause for at least one year. Mother rejects this contention, arguing that she was in “constant” communication with Child and citing to several phone calls she made.¹ Appellant’s Br. at 11.

“A determination on the significance of the communication is not one that can be mathematically calculated to precision.” *E.B.F.*, 93 N.E.3d at 763. Indeed, “[e]ven multiple and relatively consistent contacts may not be found significant in context.” *Id.* On the other hand, “a single significant

¹ Mother didn’t file a response to Stepmother’s petition for transfer.

communication within one year is sufficient to preserve a non-custodial parent's right to consent to the adoption." *Id.* (internal citations omitted).

While Mother's contact with Child was somewhat regular, the evidence supports the trial court's conclusion that her communication wasn't significant. We agree with Mother that phone contact "could be significant" communication. *See* Appellant's Br. at 11. But Father testified that, during the year at issue, the phone communication between Mother and Child averaged thirteen minutes per month.² What's more, Mother sent no letters to Child during the relevant year and never visited with her, as she was permitted to do under the custody order. Mother did, however, choose to exercise supervised parenting time with one of her other children. And as further evidence of her failure to communicate, Mother couldn't name any of Child's friends or even where she attended school. While Indiana courts have occasionally found that consent for adoption was required with less contact between a natural parent and child, those cases generally involved a parent whose active pursuit of, and success in, substance-abuse recovery justified their reduced communication with their child. *See, e.g., In re Adoption of D.H.*, 135 N.E.3d 914, 924 (Ind. Ct. App. 2019); *E.B.F.*, 93 N.E.3d at 765. While Mother did struggle with substance abuse, and while she argued that her troubles and efforts at recovery excused her lack of financial support, she advanced no such argument related to her lack of communication before either the trial court or the Court of Appeals. Instead, the evidence shows a paucity of conversations between Mother and Child and that Mother couldn't provide basic information about Child's life, such as who her friends were and where she attended school. Based on this evidence, and given our

² As the Court of Appeals noted, the phone records that Stepmother moved to admit were never admitted into evidence. *Matter of Adoption of I.B.*, 151 N.E.3d at 779. Mother contends that, because these records were never admitted, her testimony that her phone contact with Child was "constant" precluded a finding that her communication wasn't significant. Appellant's Br. at 11. While the trial court relied on these records for its determination that Mother's phone communication wasn't significant, Father's testimony to the limited time Mother spent talking with Child was sufficient to support a determination that the communication wasn't significant.

deferential standard of review, we cannot say that the trial court erred in its determination.

B. There was sufficient evidence that Mother failed to support Child when able and required to do so.

The trial court also found that Mother's consent for adoption wasn't required because she failed to financially support Child. Under the Consent-to-Adoption Statute, consent isn't required when a parent "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)(2)(B). When Father gained custody of Child, the court ordered Mother to pay \$46.00 a week in child support. Mother never paid any child support. She argues that she was unable to hold "meaningful employment" because of her time in jail, her lack of transportation due to a driver's license suspension, her efforts to regain custody of her other children, and her schooling. Appellant's Br. at 6. And because she was unable to support Child, Mother insists that the trial court's determination was erroneous.

A petitioner for adoption must show that the noncustodial parent had the ability to make the payments that she failed to make. *In re Adoption of Augustyniak*, 508 N.E.2d 1307, 1308 (Ind. Ct. App. 1987). A 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.*

Mother didn't earn much money during the year at issue. The earning statement and W-2s admitted into evidence reflect an income of \$2,224.25 during that time period. Clearly this amount is small. But it was nearly enough to satisfy her annual support obligation (\$46.00 a week times 52 weeks a year equals \$2,392.00). And it was earned when many of her own expenses were paid by others. During part of the year, Mother lived with her father. While she lived with him, she didn't pay for food or other essentials. Her fiancé's mother also assisted with expenses. Mother was not paying rent at any point. Assistance in covering necessary expenses is relevant to a finding that a parent was able to pay child support. *In re Adoption of M.S.*, 10 N.E.3d 1272, 1281 (Ind. Ct. App. 2014). Mother also

took out loans for her schooling which she used to purchase a computer and cover living expenses. While these loans may not have been available to pay child support, they acted to offset the few expenses that other parties didn't cover for Mother. Since many of Mother's expenses were covered by other people, a larger portion of the money she did earn should have been available for her to pay child support.³ Regardless of whether Mother could have obtained additional employment, her actual earnings reflect an ability to pay at least a minimal amount of support.

Still, Mother argues that "[h]er inability to provide support was justified by her efforts at recovery." Appellant's Br. at 14. The trial court found that neither Mother's substance-abuse treatment nor her schooling prevented her from obtaining employment. This determination is supported by the evidence. Mother had individual counseling and recovery coaching once a week. She engaged in supervised visitation with her other children four to eight hours a week. Her schooling, which consisted of online classes, lasted only ten weeks. Mother's incarceration spanned from July 14, 2017 to October 26, 2017. Between her schooling, which arguably could have prevented her from working, and her incarceration, Mother was not able to work for twenty-five of the fifty-two weeks at issue. That means she was available to work for twenty-seven weeks. Mother's lack of a driver's license doesn't excuse her nonpayment, either. While Mother didn't have a license, she owned a car during the year at issue and testified that she drove the car without a license. While we certainly don't condone her illegal method of transportation, *see* I.C. § 9-24-18-1, Mother's decision to drive without a license in other

³ Mother did use some of her money to purchase Christmas gifts for Child. But these gifts don't constitute support. *See In re Adoption of M.A.S.*, 815 N.E.2d 216, 220 n.1 (Ind. Ct. App. 2004) ("The occasional provision of [groceries, diapers, formula, clothing, presents, and cash] are gifts, not child support."); *Irvin v. Hood*, 712 N.E.2d 1012, 1013 (Ind. Ct. App. 1999) (Father's provision of six items of clothing and some food didn't constitute support of the child).

circumstances further supports the trial court's determination that her unemployment was voluntary.

C. We need not address whether the trial court erred in finding that Mother abandoned Child.

Finally, Mother argues that the trial court erred in determining that she abandoned Child, citing to Indiana Code section 31-19-9-8(b), which provides that a parent abandons a child when she makes "only token efforts to support or communicate with the child." This argument suggests that Mother's attempt at communicating with Child amounted to something more than a "token" effort. But Mother fails to develop this argument. Abandonment is an independent ground for dispensing with the consent requirement. *See* I.C. § 31-19-9-8(a)(1) (Consent is not required from 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.") In fact, all of Mother's arguments revolve around the one-year timetable provided by the failure-to-communicate and failure-to-support subsections, not the six months of abandonment required to dispense with the consent requirement. When Stepmother argued before the Court of Appeals that Mother had waived the issue of abandonment, Mother simply responded that her arguments about failure to communicate and failure to support were applied to the abandonment issue as well. Appellant's Reply Br. at 4. The Court notes that these issues seem to require separate analyses because the time period at issue is different. *See* I.C. §§ 31-19-9-8(a)(1), (a)(2). Mother didn't engage in a separate analysis related to abandonment.

Because Mother's argument that she hadn't abandoned Child is arguably waived for failure to present a cogent argument, *see United States Fid. & Guar. Ins. Co. v. Hartson-Kennedy Cabinet Top Co.*, 857 N.E.2d 1033, 1038 (Ind. Ct. App. 2006), and because other grounds support the trial court's conclusion that Mother's consent wasn't required, we decline to address whether the trial court committed clear error when it determined that Mother abandoned Child.

Conclusion

Because the evidence supports the trial court's findings that Mother for one year failed to significantly communicate with Child and support Child when able to do so, we affirm the trial court.

Rush, C.J., and David, Massa, and Slaughter, JJ., concur.

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