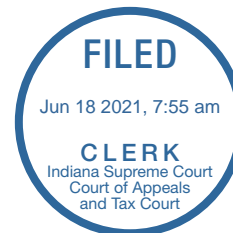


MEMORANDUM DECISION

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.



ATTORNEY FOR APPELLANT

Alexander L. Hoover
Nappanee, Indiana

ATTORNEY FOR APPELLEES:

Ralph R. Huff
Plymouth, Indiana

IN THE COURT OF APPEALS OF INDIANA

In the Matter of the Adoption of:
M.M.J. and E.L.S (Minor
Children),

and

R.S.
(Mother),

Appellant-Respondent,

v.

M.D.J. and C.D.J.
(Adoptive Parents),

Appellee-Petitioner.

June 18, 2021

Court of Appeals Case No.
21A-AD-43

Appeal from the Marshall Superior
Court

The Honorable Curtis Palmer,
Judge

Trial Court Cause No.
50C01-2005-AD-9
50C01-2005-AD-11

Tavitas, Judge.

Case Summary

- [1] R.S. (“Biological Mother”) appeals from the trial court’s determination that her consent is not required for the adoptions of her biological children, M.M.J. and E.S., (collectively, “the Children”), by C.D.J. (“Adoptive Father”), who is the biological father of M.M.J., and M.D.J. (“Adoptive Mother”), collectively (“Adoptive Parents”).¹ Finding the Adoptive Parents established, by clear and convincing evidence, that: (1) Biological Mother failed to communicate significantly with the Children for a one-year period when she was able to do so; and (2) Biological Mother made only token efforts to communicate with the Children, we conclude that the trial court did not clearly err in determining that Biological Mother’s consent was not required for the adoptions. Accordingly, we affirm.

Issue

- [2] Biological Mother raises two issues on appeal, which we consolidate and restate as whether the trial court clearly erred in finding that Biological Mother’s consent was not required for the adoption of the Children.

Facts

- [3] In December 2004, M.M.J. was born to Biological Mother and Adoptive Father, who were not married. Adoptive Father executed a paternity affidavit

¹ We recognize that C.D.J. is the biological father of M.M.J., but is not the biological father of E.S. For efficiency’s sake, however, we identify C.D.J. as “Adoptive Father” for purposes of this decision.

upon M.M.J.'s birth. Biological Mother's and Adoptive Father's relationship ended in approximately 2008, when M.M.J. was four years old. Adoptive Parents married in August 2010. On August 25, 2010, the trial court granted primary physical custody of M.M.J. to Adoptive Father; ordered Biological Mother to pay child support to Adoptive Father; and granted parenting time, pursuant to the Indiana Parenting Time Guidelines, to Biological Mother.

- [4] During the decade-long period from 2010 through the entry of the appealed order, Biological Mother has been incarcerated for multiple drug-related offenses.² When Biological Mother was incarcerated, she occasionally sent letters to M.M.J. and telephoned to speak with M.M.J.; however, when Biological Mother was out of jail, she contacted M.M.J. less frequently.
- [5] In January 2012, E.S. was born to Biological Mother and J.W.³ The trial court granted primary physical custody of E.S. to Biological Mother and ordered

² Biological Mother's criminal history is comprised solely of drug-related offenses. She has a prior criminal conviction for dealing in methamphetamine, a Level 4 felony (2015), for which she was sentenced to twelve years in the Department of Correction ("DOC"), with eight years executed and four years suspended. Biological Mother also has a prior conviction for dealing in methamphetamine, a Level 5 felony (also in 2015), for which she was sentenced to six years in the DOC.

Biological Mother was incarcerated from March 2017 to approximately late September 2018. In September 2018, after Biological Mother completed the DOC's Therapeutic Community program, her sentence on the Level 4 felony conviction was modified to a community correction placement on home detention. Biological Mother subsequently violated the terms of the home detention program when she failed a drug test in September 2019. Biological Mother was in jail from September 29, 2019, through November 10, 2019, and was reincarcerated from February 2020 through the date of the hearing.

At the time of the hearing, Mother faced pending criminal charges for: (1) interfering with a drug or alcohol screening test, a Class B misdemeanor; (2) three counts of dealing in methamphetamine, a Level 2 felony; and (3) dealing in a Schedule IV controlled Substance, a Level 6 felony.

³ J.W., who was determined to be E.S.'s father in a January 2013 paternity decree, is not a party to this appeal.

J.W. to pay child support to Biological Mother. In August 2013, Adoptive Parents sought guardianship of E.S., which was granted with Biological Mother's and J.W.'s consent in March 2014.

[6] Biological Mother was incarcerated from March 2017 through September 2018. As was the case regarding M.M.J., Biological Mother made sporadic contact with E.S. by telephoning occasionally and sending a few letters. In May 2017, Biological Mother filed a petition for visitation with the Children at the prison, which was granted. The court-ordered visitation session did not occur due to administrative issues encountered by the Adoptive Parents. Biological Mother was released from incarceration before the issue was resolved.

[7] Upon her release from incarceration in approximately October 2018, Biological Mother was released to a drug rehabilitation facility, where she resided for a year. The Adoptive Parents brought the Children to the rehabilitation facility for monthly visits while Biological Mother resided there; however, the Adoptive Parents did not continue this practice after Biological Mother was released to a halfway house. As was the case beforehand, Biological Mother contacted the Children less frequently after she was released from incarceration.

[8] On May 15, 2020, Adoptive Mother filed a petition to adopt M.M.J., and the Adoptive Parents filed a petition to adopt E.S.⁴ Biological Mother and J.W.

⁴ The record reflects that the Adoptive Parents simultaneously petitioned to adopt a third child, whose adoption is not at issue in this appeal.

were served with notice of the adoptions and the petitions for adoption regarding the Children. On May 26, 2020, Biological Mother, pro se, filed objections to the adoption petitions;⁵ and on June 12, 2020, Biological Mother, by counsel, filed motions to contest the adoptions.

[9] On November 19, 2020, the trial court conducted a hearing on Biological Mother's motions to contest the adoptions. Adoptive Mother testified, in part, that: (1) Biological Mother initiated contact inconsistently with the Children and more so when Biological Mother was incarcerated; (2) Adoptive Parents accommodated Biological Mother's requests to contact Children when possible and only denied visits when the Children were unavailable or their schedules conflicted with Mother's last-minute visitation requests, and offered alternative options; (3) before Adoptive Parents filed the petitions for adoption, Biological Mother had not recently contacted the Children or paid any child support for M.M.J.; (4) Biological Mother only renewed her efforts to contact the Children after Adoptive Parents filed the petitions for adoption; and (5) Biological Mother last visited with the Children in September 2019.

[10] Adoptive Father testified, in part, that Biological Mother: (1) has struggled with drug addiction for approximately a dozen years; (2) failed to maintain consistent housing over the years; (3) paid nominal child support for M.M.J. over the decade-long period, skipped paying for entire years, and paid no child

⁵ J.W. did not object to Adoptive Parents' petition to adopt E.S. and was deemed to have given his implied consent to E.S.'s adoption.

support in the year before the hearing; and (4) failed to contact the Children for a protracted period before the hearing. Adoptive Father testified further that the Adoptive Parents have allowed Biological Mother to speak with the Children on the telephone, relayed Biological Mother's letters to the Children, and did not obstruct Biological Mother's communication efforts.

[11] Biological Mother testified that she had been incarcerated for the approximately nine-month-period preceding the hearing. Biological Mother acknowledged her ongoing drug addiction issues; recounted her criminal history, which is comprised solely of drug-related offenses; and admitted that she faces pending charges on additional drug-related offenses. She denied any willful abandonment of the Children or any intention to relinquish her parental rights to the Children. She further testified that she wanted to be in contact with the Children and telephoned, sent letters “[a]t least once a week”, and bought gifts for the Children. Tr. Vol. II p. 50. Although Biological Mother testified that some of her telephone calls to the Children went unanswered and some of her requested visits were declined, she admitted that the Adoptive Parents generally allowed her to speak with the Children and granted her opportunities to visit with the Children. She also admitted, however, that her last contact with the Children was in September 2019 because she returned to jail. Additionally, Biological Mother testified that, before the Adoptive Parents filed the petitions for adoption, she last attempted to contact the Children in November 2019; she admitted that she did not renew her attempts at contact until after the Adoptive Parents filed their petitions for adoption in May 2020.

[12] The trial court entered its orders on December 14, 2020, wherein it found that: (1) the Adoptive Parents proved, by clear and convincing evidence, that Biological Mother failed to communicate significantly with the Children without justifiable cause for a period of at least one year, abandoned the Children, and was unfit to parent; (2) it is in the best interests of the Children for the petitions for adoption to proceed without Biological Mother's consent; and (3) Biological Mother's consent was not necessary for purposes of the adoption petitions.

[13] The trial court's most pertinent findings are as follows⁶:

10. . . . [M]other has been incarcerated for drug offenses numerous times throughout [the Children's lives].

11. [M]other's contact with [E.S.] since 2013 [and with M.J. since 2010] has been sporadic, consisting primarily of a few phone calls and letters along with occasional visits when [M]other was not incarcerated. Mother's attempts to contact [the Children] increased whenever [M]other was incarcerated, but then decreased each time she was released.

12. When [M]other was not incarcerated and requested visits with [the Children], she was welcomed into the [Adoptive Parents'] home including attending some family meals.

13. [M]other has always known where [the Children] and the [Adoptive Parents] were living. Prior to this adoption petition

⁶ The trial court entered separate, yet substantially-similar, orders regarding the Children.

being filed, the [Adoptive Parents] have not interfered in [M]other's occasional attempts to have contact with [the Children]. . . .

14. Mother's criminal history includes two separate 2015 convictions for Dealing in Methamphetamine for which she received concurrent twelve and six year sentences. Following her release she spent another year at [] a drug rehabilitation facility.

15. In 2019[,] [M]other was charged again with Dealing in Methamphetamine in Marshall County, and separately with Dealing in Methamphetamine in St. Joseph County. These cases remain pending. She also has a separate criminal case pending in which she is charged with interfering with a drug or alcohol test. She is currently incarcerated for violations of the terms of her probation from the 2015 Marshall County conviction.

* * * * *

17. Mother's last visit prior to the filing of this adoption petition . . . was September 19, 2019. Mother has been in the Marshall County Jail since at least February 24, 2020.

18. [M]other has not significantly communicated with or visited [E.S.] in more than a token fashion over the past seven years [and has not significantly communicated with or visited M.M.J. in more than a token fashion over the past ten years.] More of [Mother's] attempted contacts have occurred while she was incarcerated as opposed to when she was out of jail or prison. The evidence is clear and convincing that [M]other had the ability to communicate with [the Children] over th[ose] span[s] of time, if only she had chosen to do so.

19. . . . [Adoptive Parents] have met their burden of proving that there has been a period of at least one year where, without justifiable cause, [M]other did not communicate significantly with the [Children] as required by IC § 31-19-9-8(a)(2)(A).

20. Due to her only token efforts to communicate with [the Children], the Court further finds the [C]hild[ren] ha[ve] been abandoned by [M]other under IC § 31-19-9-8(b)

* * * * *

23. The Court also finds the petitioners have met their burden of proving as result of mother’s ongoing drug addiction and her numerous incarcerations, she is unfit to be parent to [M.M.J. NS E.S.] as required by IC 31 -19-9-8(a)(11)(A).

Mother’s App. Vol. II pp. 117-20, 123-25. Biological Mother now appeals.

Analysis

[14] Biological Mother alleges that the trial court clearly erred in finding that her consent to the adoption was unnecessary because Adoptive Parents “failed to show by clear and convincing evidence that [Biological Mother] had abandoned the children” or “was unfit to be a parent.” Biological Mother’s Br. p. 6. Generally, this Court gives considerable deference to the trial court’s decisions in family law matters because the trial court is in a better 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.” *Adoption of E.B.F.*, 93 N.E.3d 759, 762 (Ind. 2018) (cleaned up).

[15] Our standard of review in adoption proceedings is well-settled:

When reviewing adoption proceedings, we presume that the trial court's decision is correct, and the appellant bears the burden of rebutting this presumption. 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. The trial court's findings and judgment will be set aside only if they are clearly erroneous. A judgment is clearly erroneous when there is no evidence supporting the findings or the findings fail to support the judgment. 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.

Adoption of O.R., 16 N.E.3d 965, 972-73 (Ind. 2014) (citations and quotations omitted).

[16] As our Supreme Court has recently opined:

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. But “even the status of a natural parent, though a material consideration, is not one which will void all others.” And “under carefully enumerated circumstances,” the adoption statutes allow “the trial court to dispense with parental consent and allow adoption of the child.” [] *See* Ind. Code ch. 31-19-9 (the Consent-to-Adoption Statute).

Adoption of I.B., 163 N.E.3d 270, 274 (Ind. 2021) (quoting *Adoption of N.W.*, 933 N.E.2d 909, 913 (Ind. Ct. App. 2010)), (internal citations omitted).

[17] Generally, a parent’s consent to adoption of a child under the age of eighteen is required. Ind. Code § 31-19-9-1. Indiana Code Section 31-19-9-8 enumerates circumstances under which a trial court may dispense with the consent of an absent parent to grant a potential adoptive parent’s petition to adopt. Our Supreme Court has stated that “the statute’s design tries to limit an absent parent’s ability to thwart potential adoptive parents’ efforts to provide a settled environment[,]” where that absent parent has previously “purposefully sought to abandon her child.” *E.B.F.*, 93 N.E.3d 759, 767 (Ind. 2018).

[18] Where a petition for adoption alleges the natural parent’s consent is not required and the natural parent contests the adoption, the petitioner bears the burden to prove that the natural parent’s consent is unnecessary. Ind. Code § 31-19-10-1.2(a). The party bearing this burden of proof must prove his or her case by clear and convincing evidence. I.C. § 31-19-10-0.5.

[19] Indiana Code Section 31-19-9-8 provides, in part, as follows:

(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.

* * * * *

(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.

* * * * *

(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.

I.C. § 31-19-9-8 (emphasis added). Here, the trial court dispensed with Biological Mother's consent due to her: (1) failure to communicate significantly with the Children without justifiable cause for a period of at least one year; (2)

abandonment of the Children; (3) failure to communicate significantly with the Children when she was able to; and (4) unfitness to parent.⁷

[20] Biological Mother’s argument on appeal is more accurately framed as a challenge to the trial court’s determination that she failed to communicate significantly with the Children without justifiable cause for a period of at least one year. *See* Biological Mother’s Br. pp. 8, 9. Specifically, Biological Mother: (1) maintains that “the record is full of examples of [her] attempting to contact her children at multiple points and even being thwarted by the [Adoptive Parents]”; (2) acknowledges she was incarcerated “for a majority of the [] one [] year preceding the petition being file[d]”; and (3) seeks “leeway[,]” as an incarcerated parent with an “already existing relationship with the [C]hildren” and a “demonstrated commitment and interest in maintaining a parental relationship” with the Children. *Id.*

[21] Our Supreme Court recently decided *Adoption of I.B.*, which is particularly instructive to our review. In *I.B.*, after the natural parents’ divorce and the family court’s grant of legal and physical custody to the mother, the father obtained legal and physical custody of the child. The mother suffered from

⁷ Because Indiana Code section 31-19-9-8(a) is written in the disjunctive, subsections (1) through (11) each provide an independent ground for dispensing with a natural parent’s consent before an adoption may proceed. *See I.B.*, 163 N.E.3d at 274. Accordingly, because sufficient evidence supports the trial court’s finding of failure to communicate significantly, we will not address the trial court’s additional finding of unfitness. Further, Biological Mother does not specifically challenge the trial court’s finding of abandonment and appears to conflate the abandonment issue with the failure to communicate issue. Because sufficient evidence supports the trial court’s finding of failure to communicate, we also will not address the trial court’s finding that Biological Mother abandoned the Children.

drug addiction, was subsequently incarcerated, failed to exercise parenting time with the child, and did not pay child support as ordered, despite her ability to pay. The father remarried, and the child's stepmother sought to adopt the child. The petition for adoption alleged that the natural mother's consent was not required for the adoption. The trial court granted the petition, finding *inter alia* that the natural mother failed to significantly communicate with the child for more than a year. The stepmother appealed to this Court, which reversed, finding that the stepmother failed to establish, by clear and convincing evidence, that the natural mother's consent was unnecessary. The stepmother petitioned for transfer, which was granted.

[22] The *I.B.* Court issued the following “fact-sensitive” guidance to aid courts’ determination of “what constitutes significant communication” for purposes of Indiana Code Section 31-19-9-8(a)(2)(A):

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

I.B., 163 N.E.3d at 276. Regarding the mother's failure, without justifiable cause, to communicate significantly with the child for at least one year, our Supreme Court observed:

“A determination on the significance of the communication is not one that can be mathematically calculated to precision.” Indeed, “[e]ven multiple and relatively consistent contacts may not be found significant in context.” On the other hand, “a single significant communication within one year is sufficient to preserve a non-custodial parent’s right to consent to the adoption.”

Id. (quoting *E.B.F.*, 93 N.E.3d at 763). The Court added:

Indiana courts have occasionally found that consent for adoption was required with less contact between a natural parent and child [in] cases [that] generally involved a parent whose active pursuit of, and success in, substance-abuse recovery justified their reduced communication with their child.

Id. at 277 (citing *Adoption of D.H.*, 135 N.E.3d 914, 924 (Ind. Ct. App. 2019); *E.B.F.*, 93 N.E.3d at 765)).

[23] In reviewing the evidence, the *I.B.* Court found that the mother failed to send letters or visit the child; her telephone contact with the child “wasn’t significant” and consisted of approximately thirteen minutes on the phone each month; and the mother lacked “basic information about [the c]hild’s] life[.]” *Id.* at 277. Our Supreme Court also found the mother failed to argue below that her pursuit of substance abuse recovery justified her limited communication with the child. Finding “ample evidence support[ed]” the trial court’s determinations, our Supreme Court affirmed the trial court. *Id.* at 274.

[24] At the time of the hearing, M.M.J. was nearly sixteen years old and had resided with Adoptive Father and Adoptive Mother for ten years. E.S. was nearly nine

years old and had resided with the Adoptive Parents on and off since infancy and full-time since she was two years old. Biological Mother has had sporadic contact with M.M.J. since 2010 and with E.S. since 2013. Biological Mother's contact primarily consisted of infrequent telephone calls and a few letters when Biological Mother was incarcerated and inconsistent visits when Biological Mother was not incarcerated. By her own admission, Biological Mother's last contact with the Children was in September 2019 because she was re-incarcerated.

[25] Biological Mother's testimony that she wanted to be in contact with the Children and telephoned, sent letters "[a]t least once a week", sent them a recording of herself reading a story, and bought gifts, tr. vol. II p. 50, was contradicted by the Adoptive Parents' testimony that, over the years, Biological Mother: (1) initiated contact with the Children inconsistently; (2) made more effort to contact the Children when she was incarcerated; (3) failed to contact the Children for a protracted period before the Adoptive Parents filed the petitions for adoption; and (4) only renewed her efforts to contact the Children after Adoptive Parents filed the petitions for adoption in May 2020. The trial court weighed the evidence and found that Biological Mother's contact was "sporadic, consisting primarily of a few phone calls and letters along with occasional visits when mother was not incarcerated." cite. There is evidence to support the trial court's finding, and we cannot reweigh the evidence.

[26] Based on our review, we agree with the trial court that Biological Mother's sporadic contacts with the Children, during their respective thirteen-year and

ten-year periods of living with the Adoptive Parents, constitute “token efforts” at communication. *See* I.C. § 31-19-9-8(b). Our characterization of Biological Mother’s efforts as “token” stems, in large part, from the fact that her efforts to contact the Children dwindled, rather than increased, when she was no longer incarcerated and had the unfettered ability to communicate with them.

[27] It is difficult, if not impossible, to characterize Biological Mother’s minimal efforts, consisting of a few letters and telephone calls, as significant, when assessing this effort over a decade-long time span. The instant circumstances echo those in *I.B.*, wherein our Supreme Court found that the mother’s limited contact with the child “wasn’t significant.” *I.B.*, 163 N.E.3d at 277. We can reasonably infer from the record that Biological Mother lacks basic information about the Children’s lives, given her failure to communicate with the Children or with Adoptive Parents about the Children, for such protracted periods. *See* Tr. Vol. II p. 19 (adoptive Mother’s testimony detailing the Children’s personal challenges: “M.M.J. is “extremely angry and very hostile [] when it comes to [Biological Mother]; and [] just the mention of [Biological Mother] gives [M.M.J.] extreme anxiety”); and “[E.S.] has been diagnosed with ADHD, PTSD, and ODD [] [S]he has extreme mood swings, outbursts, fits of anger of [] hostility. [] [S]he is very emotional. [] [S]he is, has been and currently is, seeing someone to help with that and [is] being medicated.”).

[28] Regarding Biological Mother’s request for “leeway” as an incarcerated parent with an “already existing relationship with the [C]hildren[,]” we observe that she does not argue on appeal that her substance abuse recovery efforts justified

her limited communication with the Children. *See id.* (“While Indiana cases 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 [her] reduced communication with [her] child.”). We wholeheartedly commend Biological Mother’s commitment to overcoming her ongoing addiction; however, we cannot say that she has demonstrated sufficient progress to warrant the leeway she seeks.

[29] We conclude that the trial court did not clearly err in: (1) determining that Biological Mother made only token efforts to communicate with the Children; and thus, (2) finding that Biological Mother’s consent was not required for the adoptions. *See id.* (“A judgment is clearly erroneous when there is no evidence supporting the findings or the findings fail to support the judgment.”). Because ample evidence supports the trial court’s findings, and because the record also establishes by clear and convincing evidence that Biological Mother did not communicate significantly with the Children for purposes of Indiana Code Section 31-19-9-8(a)(2)(A), we do not address the trial court’s findings that Biological Mother abandoned the Children or is unfit to parent the Children.

Conclusion

[30] The trial court did not clearly err in determining that Biological Mother failed to communicate significantly with the Children without justifiable cause for a period of at least one year and that Biological Mother’s consent was not required for the adoptions. We affirm.

[31] **Affirmed.**

Najam, J., and Pyle, J., concur.