



A.S., the natural father of D.A.S. (Father), appeals from the trial court's order granting G.W.B.'s petition to adopt D.A.S. G.W.B. (Stepfather) is married to D.A.S.'s natural mother (Mother). Pursuant to Ind. Code Ann. § 31-19-9-8(a)(2)(A) (West, PREMISE through 2008 2nd Regular Sess.), the trial court found that Father's consent to the adoption was not required because he failed to communicate significantly with his son for at least one year when capable of doing so. On appeal, Father presents the following restated issue for review: Did Stepfather present sufficient evidence to establish that Father's consent was unnecessary?

We affirm.

D.A.S. was born to Mother and Father in April 1998,<sup>1</sup> and paternity was established in the Elkhart Superior Court the following month. Although Mother and Father were no longer together at the time of D.A.S.'s birth, they reconciled and lived together from November 1998 to February 1999. Following their separation, Father regularly visited with D.A.S. until he was incarcerated in April 1999 for his third driving while intoxicated offense. Father was released from prison in December 1999 and moved to Kentucky sometime within the following year. During 2000, Father visited with his son from time to time while traveling back and forth from Kentucky, and Mother was found in contempt on April 14 for interfering with Father's visitation.

In November 2000, Father was arrested and charged in Kentucky with multiple firearm offenses. The state charges were ultimately dismissed when the federal government

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<sup>1</sup> Father has a daughter from a prior relationship who is about four years older than D.A.S. Father has not visited with his daughter since 2000, and D.A.S. has had no contact with his half-sister for a significant period of time.

commenced prosecution and obtained a conviction. As a result, Father was incarcerated in the Federal Bureau of Prisons from January 2001 to January 2007.<sup>2</sup> Father is currently on federal parole in Kentucky, and he last saw D.A.S. prior to his incarceration in January 2001.

After Father went to prison, Mother initially wrote letters to Father and sent him updated pictures of their son. In an April 2001 letter, written just after D.A.S. turned three years old, Mother urged Father to “write once in a while.” *Appendix* at 316. She wished Father well, provided him with her address, and told him, “you can write to [D.A.S.] as often as you want.” *Id.* at 317. In a postscript, Mother stated, “[D.A.S.] says ‘I love you’ (and he really does!)”. *Id.* (emphasis in original). Mother indicated at the hearing in this matter that she saved all correspondence sent from Father to their son. A review of said correspondence reveals that Father did not begin sending letters or cards to his son from federal prison for over two years.

In February 2003, Mother married Stepfather<sup>3</sup> and filed a petition for name change, seeking to change D.A.S.’s surname to the surname she now shared with her new husband. Father immediately responded with a pro se written request for the court to deny Mother’s petition. Thereafter, in July 2003, Father wrote his first letter to D.A.S. from federal prison, indicating that he was sorry he had not written sooner but that he did not have D.A.S.’s address. These letters continued on a nearly monthly basis for about a year and a half until

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<sup>2</sup> Father served a short stint in a half-way house in 2006, but was returned to prison after violating the rules of that program.

<sup>3</sup> Since February 2003, Stepfather has been a father figure to D.A.S. and has provided him with love, financial support, and a stable home environment. D.A.S. began referring to Stepfather as “Dad” within two years of Mother and Stepfather’s marriage.

two letters sent in December 2004 and January 2005 were returned as undeliverable because the recipient had moved and left no forwarding address. Mother, Stepfather, and D.A.S. had, in fact, moved to a new home around this time. In an October letter to Father, Mother had indicated that the family would be moving, though she did not provide him with the new address. Mother, however, went to the courthouse in late January and notified the clerk's office of their new address for purposes of child support.<sup>4</sup> Further, the family's address and phone number were always listed for public access.

Following the two returned letters, Father stopped writing his son and did nothing to try to locate him. Thus, between January 2005 and April 2006, Father had no contact with D.A.S. through letters or otherwise. He once again began writing D.A.S. after being served with Stepfather's petition for adoption, which included D.A.S.'s address and was filed on April 18, 2006.<sup>5</sup> Thereafter, Father wrote to D.A.S. on a nearly monthly basis until his release from prison in January 2007. At that point, letters became more sporadic, with only four letters sent in 2007. Father sent D.A.S. a Christmas present for the first time in 2007, as well as a birthday present in 2008 just prior to the hearing in this matter.

Father inappropriately called D.A.S.'s home at about 4:30 a.m. following his release from prison. Father called on a few subsequent evenings, around his son's bedtime, but was

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<sup>4</sup> At all times pertinent to this case, Father was ordered to pay \$800 a year, in two semi-annual installments, for D.A.S.'s support. While Father did not pay his obligations as specifically directed, he did make somewhat regular weekly payments in varying amounts, most often \$10. From 2001 through 2006 he paid a total of \$2280 (almost half of his child support obligation over that period, despite the fact he earned only \$5.25 per month while incarcerated). Upon his release from prison, Father has continued to make small child support payments.

not permitted to speak with D.A.S. Mother eventually contacted Father's parole officer, who then instructed Father not to make any more calls. At no time following his release from prison did Father petition the court for visitation with D.A.S., despite the fact that he sent several pro se filings to the trial court over the years.

On September 27, 2007, the contested adoption hearing commenced with Father representing himself. The trial court quickly determined that the matter should be continued so that Father could seek counsel. Father obtained counsel and the evidentiary hearing was then held on April 15, 2008.<sup>6</sup> Thereafter, on September 17, 2008, the trial court issued a detailed order in which it concluded Father's consent to the adoption was not required because he had failed to maintain significant communication with D.A.S. for more than one year when he was capable of doing so. Father filed a motion to correct error on October 17, challenging a number of the court's findings of fact. The trial court denied Father's motion the same day. Father now appeals.

We will not disturb a trial court's ruling in adoption proceedings unless the evidence leads to but one conclusion and the trial judge reached the opposite conclusion. *In re Adoption of M.A.S.*, 815 N.E.2d 218 (Ind. Ct. App. 2004). Further, we will not reweigh the evidence but instead will examine the evidence most favorable to the trial court's decision, together with reasonable inferences drawn therefrom, to determine whether sufficient evidence exists to sustain the decision. *Id.* "The decision of the trial court is presumed to be

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<sup>5</sup> Father filed a lengthy, pro se response in opposition to the adoption petition on May 9, 2006.

<sup>6</sup> At the time of this hearing, Father was living in Kentucky with his girlfriend and her children.

correct, and it is the appellant's burden to overcome that presumption." *Id.* at 219.

Pursuant to I.C. § 31-19-9-8, a parent's consent to adopt a child is not required if the potential adoptive parent can demonstrate "by clear and convincing evidence", *In re Adoption of M.A.S.*, 815 N.E.2d at 220, that certain conditions exist:

(a) Consent to adoption, which may be required under section 1 of this chapter, is not required from any of the following:

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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:

(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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The subsections regarding significant communication and failure to support are framed in the disjunctive. Thus, either of the two criteria is sufficient to establish that the adoption without parental consent may move forward. *In re Adoption of J.P.*, 713 N.E.2d 873 (Ind. Ct. App. 1999). Moreover, the one-year period need not immediately precede the filing of the adoption petition. *Id.*; *In re Adoption of Subzuda*, 562 N.E.2d 745 (Ind. Ct. App. 1990).

As set forth above, the trial court determined that Father's consent was not required because he had failed for at least one year to communicate significantly with D.A.S. when he was able to do so.<sup>7</sup> Under this provision of the statute, the one petitioning to adopt absent parental consent has the burden of proving both a lack of communication for the statutory

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<sup>7</sup> The court rejected Stepfather's claim that Father failed to provide for the care and support of D.A.S. when able to do so, noting: "Although incarcerated for six years, he managed to pay \$2,360.00 in child support." *Appendix* at 127.

period and that the parent had the ability to communicate with the child during that time span. *Rust v. Lawson*, 714 N.E.2d 769 (Ind. Ct. App. 1999), *trans. denied*. Whether this burden has been met is necessarily dependent upon the facts and circumstances of each particular case. *Id.* “Efforts of a custodial parent to hamper or thwart communication between parent and child are relevant in determining the ability to communicate.” *Id.* at 772. Further, the noncustodial parent must make more than token efforts to communicate with the child, as the intent of the statute is to foster and maintain communication between noncustodial parents and their children, “not to provide a means for parents to maintain just enough contact to thwart potential adoptive parents’ efforts to provide a settled environment to the child.” *In re Adoption of J.P.*, 713 N.E.2d at 876. *See also Rust v. Lawson*, 714 N.E.2d 769.

Father argues that he maintained significant communication with D.A.S. while in federal prison by writing to him and sending him cards until his correspondence was returned as undeliverable in December 2004 and January 2005. Father claims he was unable to write his son from January 2005 to April 2006 as a result of Mother moving without providing him with the new address. Further, Father asserts that he did not petition the court for visitation after his release in January 2007 because his parole officer directed him not to make contact with Mother or D.A.S. and because he was not permitted to leave the state of Kentucky without permission. He also notes that he attempted to call his son on a few occasions since his release but was not permitted to speak with D.A.S. and Mother eventually requested that he not call back. In sum, Father claims that he significantly communicated with his son when

he was able to do so.

We observe that although imprisonment standing alone does not establish statutory abandonment so as to allow an adoption to take place without obtaining the consent of an incarcerated parent, “[n]either should confinement alone be deemed a justifiable reason for failing to maintain significant communication with one’s child.” *Matter of Herman’s Adoption*, 406 N.E.2d 277, 279 (Ind. Ct. App. 1980). Further, we acknowledge that incarceration unquestionably alters the means for significant communication. *Lewis v. Roberts*, 495 N.E.2d 810 (Ind. Ct. App. 1986). “What constitutes insignificant communication with a free parent may be significant in relation to an incarcerated parent with limited access to his child.” *Id.* at 813.

The record before us indicates that Father sent no letters to D.A.S. while confined in federal prison until after he was served with notice of Mother’s petition for name change in February 2003, just after marrying Stepfather. Even then, Father did not commence writing to his son until July, five months after the petition was filed. At this point, Father had been confined and had not significantly communicated with or seen his son for two and one-half years. Further, there is no indication that Mother thwarted communication between Father and D.A.S. during the period of his initial incarceration. In fact, just after Father was incarcerated, Mother wrote to him and urged him to write often in order to stay in contact with his son. During this time, Mother also sent letters to Father, which included updated pictures of D.A.S. and drawings by the child.

Beginning in July 2003, Father finally commenced writing his then five-year-old son

on a relatively regular, monthly basis. This ended by January 2005, after two letters were returned to Father as undeliverable. Father had no further communication with his son until he received notice of the adoption petition in April 2006, more than a year later. Like the trial court, we are not persuaded by Father's argument that he could not send letters during this time because Mother had not advised him of their new address. *See Matter of Herman's Adoption*, 406 N.E.2d 277. Father made no attempt to locate his son by, for example, contacting the paternity court,<sup>8</sup> which he had done on several other occasions. *See id.* at 280 (noting that the incarcerated father had "the ability to enforce his visitation rights through the courts").

The record clearly supports the trial court's determination that Father failed to significantly communicate with D.A.S. for a period of more than a year (that is, between January 2005 and April 2006) when able to do so.<sup>9</sup> Moreover, the trial court aptly observed that Father's efforts to communicate with D.A.S. diminished after being released from prison in January 2007. Father wrote his son just four times in 2007 and made calls at only inopportune times.<sup>10</sup> *Cf. In re Adoption of J.P.*, 713 N.E.2d at 876 ("C.H.'s short, not-quite-monthly visits with J.P. ... do not establish significant communication"). Further, upon his

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<sup>8</sup> Within a month of moving, Mother notified the child support clerk of her new address for purposes of receiving child support. Further, Mother and Stepfather's new address and phone number were listed for public access. Therefore, Father could have contacted directory assistance or friends or family to help locate their new address.

<sup>9</sup> In fact, the record reveals that Father had another lengthy period without significant communication from January 2001 through July 2003.

<sup>10</sup> With respect to the few phone calls made by Father, the court observed: "The motive behind Father's telephone calls is suspect given that such calls were made late at night when no responsible parent would expect his child to be awake. At least one call was made at approximately 4:30 a.m." *Appendix* at 124.

release, Father did not seek permission from his parole officer to travel to Indiana to exercise parenting time with his son, nor did he file a petition in any court to seek or enforce parenting time.<sup>11</sup> As the trial court observed, although Father attended every hearing in this case and consistently maintained that he desires a relationship with his son, “Father has taken no concrete, affirmative steps to realize such a relationship.” *Appendix* at 124.

Father has not seen D.A.S. since January 2001 and has been incarcerated most of his son’s life. At times, Father attempted to maintain significant communication with his son while he was incarcerated. These periods of arguably significant communication, which were apparently triggered by the petitions filed by Mother and Stepfather, were unfortunately always fleeting. The trial court properly rejected Father’s attempt to maintain just enough contact to thwart Mother and Stepfather’s efforts to provide a settled environment to D.A.S. after so many years. Stepfather sufficiently established that Father’s consent to the adoption was not required.

Judgment affirmed.

NAJAM, J., and VAIDIK, J., concur.

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<sup>11</sup> To the extent Mother attempted to thwart communication between Father and D.A.S., the trial court found such efforts to have been minimal and that they “could easily have been addressed by the paternity court, as Father was well aware from his prior experience with that court.” *Appendix* at 130. The court noted, “Father simply elected not to do so.” *Id.* We agree with the trial court.