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IN THE
COURT OF APPEALS OF INDIANA

Br.S.,
Appellant-Petitioner,

v.

J.N.S.,
Appellee-Respondent

May 12, 2021
Court of Appeals Case No.
20A-AD-1790
Appeal from the
Delaware Circuit Court
The Honorable
Marianne Vorhees, Judge
Trial Court Cause Nos.
18C01-1809-AD-107
18C01-1809-AD-108

Vaidik, Judge.

Case Summary

- [1] A stepmother filed a petition to adopt her two stepchildren, alleging the biological mother's consent wasn't required because, for at least one year, she failed without justifiable cause to communicate significantly with her children

when able to do so. The trial court found the biological mother was able to communicate with her children but failed to do so for nearly two-and-a-half years. However, the court found the biological mother had justifiable cause for not communicating with her children because she was recovering from drug addiction. Although the record shows the biological mother spent four months getting “clean,” there is no evidence about what she did for the rest of the time. Without this evidence and looking to the totality of the circumstances, the biological mother’s failure to communicate with her children is not justifiable. The court’s judgment is clearly erroneous. We therefore reverse and remand.

Facts and Procedural History

[2] C.S. (“Father”) and J.N.S. (“Mother”), who have never married, have two children together, B.S., born in February 2010, and C.S., born in October 2013 (collectively, “the children”).¹ When C.S. was born, she was addicted to heroin and spent time in the NICU withdrawing. Tr. pp. 82, 116. Thereafter, the children were the subject of a CHINS investigation due to Mother’s drug use. Father, who had not yet established paternity of the children, was incarcerated. After his release, Father married Br.S. (“Stepmother”) in May 2015 and established paternity of the children in Randolph Circuit Court in July 2015. *See* Cause Nos. 68C01-1505-JP-64/71. In January 2016, Father was awarded

¹ Mother has three additional children, R., S., and L. At the time of the hearing in August 2019, R. was fifteen years old, S. was two years old, and L. was one month old.

custody of the children, and Mother was awarded parenting time to be supervised by Father, Stepmother, or another agreed-upon adult. Stepmother supervised weekly visits between Mother and the children from January 2016 to April 2016, when Mother was arrested on a drug-related offense in Ohio and spent four days in jail. After her release, Mother talked to Father, who told her to get help for her drug addiction.

[3] Over a year later, in July 2017, Mother went to her father’s house in Florida to “get clean.” Tr. p. 72. According to Mother, the last day she used drugs was July 23, 2017. While in Florida, Mother sent Stepmother two Facebook messages—one on September 10 and the other on October 27—asking to talk to the children. Stepmother didn’t know about the messages at the time and therefore didn’t respond to them.

[4] Mother returned to Indiana in November 2017, when she “felt strong enough to come back” because she didn’t want to “come back around the same people, places and things.” *Id.* at 78. Upon her return, Mother did not contact the children. But about nine months later, in August 2018, Mother filed a petition to modify custody, parenting time, and child support in the Randolph County paternity case. The next month, on September 24, Stepmother filed a petition to adopt the children in Delaware Circuit Court. The petition alleged Mother’s consent to the adoption wasn’t required because, for at least one year, she failed without justifiable cause to communicate significantly with the children when able to do so. *See* Ind. Code § 31-19-9-8(a)(2)(A). The trial court issued a decree granting the adoption in November 2018; however, the next month Mother

moved to set aside the adoption because she was not properly served. In March 2019, the court set aside the adoption.

[5] Hearings on whether Mother’s consent was required were held in August 2019 and June 2020. In August 2020, the trial court issued an order denying Stepmother’s petition to adopt the children. The court made several findings unfavorable to Mother. Specifically, the court found Mother “had no significant communication” with the children from April 2016 (when Mother was arrested in Ohio) to September 2018 (when Stepmother filed the adoption petition) and that the “only” communication from Mother to the children during this time was “the two Facebook messages sent in September and October 2017.” Appellant’s App. Vol. II p. 23. In addition, the court found Mother had the ability to contact the children and that her attempts to blame Father and Stepmother for her failure were “not well taken.” *Id.* However, the court found Stepmother did not prove, by clear and convincing evidence, that Mother failed “without justifiable cause” to communicate significantly with the children. *Id.* at 24. According to the court:

46. I have carefully considered the recent Indiana appellate cases considering the drug-addicted parent’s failure to communicate with a child and/or her abandoning a child while attempting to overcome drug addiction and the instability related to her addiction. The Indiana Supreme Court has considered the issue: *In re the Adoption of E.B.F. (J.W. v. D.F.)*, 93 N.E.3d 759 (Ind. 2018). The Indiana Court of Appeals quotes extensively from *E.B.F.* in [*In re Adoption of D.H.*, 135 N.E.3d 914 (Ind. Ct. App. 2019)].

47. Is [Mother] the drug-addicted mother whose failure to communicate with the children is excused by her attempts to get sober and re-establish herself financially and otherwise? This is a very close call.

48. [Mother] testified she last used drugs in July, 2017. [She] did not take steps to re-establish her relationship with the children until August, 2018. What was she doing during this time period?

49. Even more specifically, what was [Mother] doing between November, 2017, when she moved back to Indiana, and August, 2018?

50. The Indiana Supreme Court's ruling in *E.B.F.* and the Indiana Court of Appeals' cases following *E.B.F.* show the appellate courts' intent that drug-addicted parents have the opportunity to rehabilitate themselves and then have the opportunity to re-establish their relationship with their children.

51. I am convinced the Indiana Supreme Court and the Indiana Court of Appeals would see this case in this light. [Mother] sought and achieved recovery from her drug addiction. She stayed in Florida, away from the negative influences. She moved to Indiana and successfully completed her court-ordered D.C.S. services for her young[er] child [S.]. [Mother] now has custody of that child.

52. [Mother] has achieved stability and deserves the opportunity to re-establish a relationship with her children.

Id. at 24-26.

[6] Stepmother now appeals.

Discussion and Decision

- [7] Stepmother appeals the denial of her petition to adopt the children. 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.” *In re Adoption of I.B.*, 163 N.E.3d 270, 274 (Ind. 2021) (quoting *E.B.F.*, 93 N.E.3d at 762). When reviewing an adoption case, we presume the trial court’s decision is correct, and the appellant must rebut this presumption. *Id.* However, to the extent the trial court’s ruling is based on an error of law or is not supported by the evidence, it is reversible. *In re Paternity of S.A.M.*, 85 N.E.3d 879, 886 (Ind. Ct. App. 2017) (citing *MacLafferty v. MacLafferty*, 829 N.E.2d 938, 941 (Ind. 2005)).
- [8] The trial court’s findings and judgment will be set aside only if they are clearly erroneous. *E.B.F.*, 93 N.E.3d at 762. A judgment is clearly erroneous when no evidence supports the findings or the findings fail to support the judgment. *Id.* We will not reweigh evidence or assess the credibility of witnesses. *Id.* Rather, we examine the evidence in the light most favorable to the trial court’s decision. *Id.*
- [9] Generally, a trial court may grant an adoption petition only if both parents consent. *See* Ind. Code § 31-19-9-1(a)(2). However, parental consent may be dispensed with under certain circumstances. *I.B.*, 163 N.E.3d at 274. One such

circumstance is where, for at least one year, “[a] parent of a child in the custody of another person” “fails without justifiable cause to communicate significantly with the child when able to do so.” I.C. § 31-19-9-8(a)(2)(A). The petitioner must prove the parent’s consent is unnecessary by clear and convincing evidence. Ind. Code § 31-19-10-1.2(a); *I.B.*, 163 N.E.3d at 274. Whether a petitioner has met this burden “is highly dependent upon the facts and circumstances of each particular case,” and we look to the totality of the circumstances. *E.B.F.*, 93 N.E.3d at 764-65.

[10] Here, the trial court found the Indiana Supreme Court’s decision in *E.B.F.* and this Court’s decision in *D.H.* supported the conclusion Mother had justifiable cause for not communicating significantly with the children. In *E.B.F.*, our Supreme Court reversed a trial court’s order granting a stepmother’s petition for adoption. The mother and father had a child born in November 2003. The mother, who had been abused by the father, had primary custody of the child for the first ten years of the child’s life. But when the child was ten, the mother’s life became less stable: she was unemployed, struggled with substance abuse, and was in a different abusive relationship. As these problems escalated, the parents agreed to joint legal custody, with the father having primary custody and the mother having parenting time “at such times and upon such conditions as the parties are able to mutually agree.” *E.B.F.*, 93 N.E.3d at 761. The mother spent time with the child on Christmas Day in 2013 but had no further meaningful contact with the child after that date. The mother spent 2014 in recovery and, by the end of the year, “had left her abusive partner, gained stable

employment, found decent housing, and successfully addressed her drug dependency.” *Id.* On January 2, 2015—one year and seven days after the mother’s last significant contact with the child—the stepmother petitioned for adoption. The father consented, and the trial court found the mother’s consent wasn’t required because she had failed to communicate significantly with the child for at least one year. The court ultimately granted the stepmother’s petition for adoption.

[11] Our Supreme Court reversed, finding the mother’s ongoing battle with addiction and good-faith effort at recovery constituted justifiable cause for not communicating significantly with the child:

[I]mportant to a justifiable cause finding in this case is evidence that **Mother made a good-faith effort at recovery during the period that she failed to communicate with Child.** Mother not only focused on her recovery during that period, she also made significant strides to end the destructive habits that led her to give up custody in the first place. Shortly after giving up custody, Mother ended her abusive relationship, found a job, and secured adequate housing for her and her daughters. By the end of 2014, she had also ended her dependency on drugs and had a good and stable home-life. Mother turned her life around in what we find was a reasonable amount of time—less than one year. Before the one-year anniversary of the custody modification, Mother seemed on the cusp of being ready to, once again, be a significant part of Child’s life, but that possibility was cut short when Stepmother’s adoption petition was granted. We are sensitive to Mother’s predicament: returning to Child’s life too early during her addiction recovery process could have derailed both her own recovery and the child’s stability. We, therefore, do not fault Mother for taking a reasonable amount of time to focus on her

recovery, even if that effort resulted in a temporary failure to communicate significantly with her child.

Because being around a child while recovering from drug dependency and an abusive relationship may not be in the best interest of either the child or the recovering mother, and **because Mother demonstrated that she made a good-faith effort at recovery, with significant progress within a reasonable amount of time, we find that Mother had justifiable cause to not communicate with Child during that one-year period.**

Id. at 765 (emphases added).

[12] In *D.H.*, this Court also reversed a trial court’s order granting a stepmother’s petition for adoption. The mother and father had a child born in April 2015. When the child tested positive for hydrocodone at birth, DCS got involved. Eventually, in a paternity action, the father was awarded primary physical custody, and the mother was awarded supervised parenting time. After a supervised visit with the child on September 11, 2016, the mother did not visit again with the child until February 3, 2018 (she did text the father in June and July 2017). “During this period, [the mother] appears to have worked to achieve sobriety”; she “passed drug screens to secure employment; maintained gainful employment; secured stable housing; and obtained means of transportation.” *D.H.*, 135 N.E.3d at 917. Thereafter, the mother resumed her requests to schedule supervised visits with the child. In April 2018, the child’s stepmother filed a petition to adopt the child. The trial court found the mother’s consent wasn’t necessary because, among other reasons, she “lacked justifiable

cause for her lack of communication with the [c]hild.” *Id.* at 918. The trial court ultimately granted the stepmother’s adoption petition.

[13] In reversing, we explained:

Guided by *E.B.F.*, we find, under the totality of the circumstances that [the mother’s]: (1) progress toward achieving sobriety after seven years of acute drug dependency; (2) employment record; (3) stable home environment; (4) lack of contacts with law enforcement; (5) favorable assessment from DCS regarding her youngest child; and (6) record of consistently visiting and paying child support for her other three children, provide justifiable cause for her failure to communicate with the Child for a time exceeding one year, such that it was clear error to dispense with her consent for purposes of [the s]tepmother’s adoption petition.

Id. at 924.

[14] In both *E.B.F.* and *D.H.*, the record contained evidence about the rehabilitative steps taken by the mothers. In *E.B.F.*, the mother “left her abusive partner, gained stable employment, found decent housing, and successfully addressed her drug dependency.” Similarly, in *D.H.*, the mother “passed drug screens to secure employment; maintained gainful employment; secured stable housing; and obtained means of transportation.” But here, we don’t know much about Mother’s rehabilitative steps other than she spent four months in Florida “get[ting] clean.” The court found Mother had achieved stability, but as Stepmother points out, there is no evidence in the record about whether Mother

has suitable housing or a job.² Instead, the record reveals that, at the time of the August 2019 hearing, Mother had been arrested earlier that month, had outstanding arrest warrants in Ohio, and had pending driving-while-suspended cases.³ Tr. pp. 9, 72, 78, 151-54, 157-58.

[15] Also, in both *E.B.F.* and *D.H.*, the parents' rehabilitative efforts were made concurrently with their absences from their children. In *E.B.F.*, the mother spent the year she did not communicate with her child "focus[ing] on her recovery." Likewise, in *D.H.*, the mother spent about eighteen months away from her child "working to achieve sobriety." But again, the same cannot be said here. As the trial court recognized, there are a lot of unanswered questions. We know Mother spent four months "get[ting] clean" in Florida, but other than that we know of no rehabilitative efforts Mother made during the remaining two years she was missing from the children's life.

[16] Finally, in both *E.B.F.* and *D.H.*, the appellate courts found the time spent in recovery (twelve months in *E.B.F.* and eighteen months in *D.H.*) to be a reasonable amount of time for rehabilitation. Here, Mother absented herself for

² Mother briefly testified about her fourth child, S., whom DCS had removed from her at some point. At the August 2019 hearing, Mother said she had gotten S. back. Tr. p. 157. There are no other details in the record, and therefore this information is not very helpful for purposes of this case. In addition, Mother notes she spent time at "Helen's House" in the summer of 2017. *See id.* at 218. But given the lack of details in the record, this information is similarly unhelpful.

³ Although the record doesn't say what Mother was arrested for, a search of the Odyssey Case Management System reveals Mother was charged with misdemeanor operating a vehicle while intoxicated and resisting law enforcement in December 2019. The offenses were alleged to have occurred on August 4, 2019 (shortly before the August 2019 hearing in this case). Mother was initially charged in Muncie City Court, but the case has been transferred to Delaware Circuit Court. A status hearing is currently scheduled for June 24, 2021.

nearly two-and-a-half years. While there can be no bright line as to how much time is reasonable, the longer the parent is absent, the more likely the failure to communicate is indefensible.

[17] We acknowledge our Supreme Court’s holding in *E.B.F.* that drug-addicted parents should have the opportunity to rehabilitate themselves and then re-establish a relationship with their children. And we appreciate the trial court’s careful consideration of the case law. However, *E.B.F.* does not stand for the proposition that drug-addicted parents have an open-ended pass for not communicating significantly with their children.

[18] Key to the *E.B.F.* and *D.H.* cases was that both mothers “demonstrated that [they] made a good-faith effort at recovery, with significant progress within a reasonable amount of time.” *E.B.F.*, 93 N.E.3d at 765. Here, Mother did not present such evidence. We are aware Stepmother bore the burden of proving Mother’s failure to communicate significantly with the children was not justifiable. While proving a negative is difficult, we are convinced Stepmother has met that burden. Examining the record and findings of the trial court and looking to the totality of the circumstances, we find the findings do not support the judgment. As the trial court found, Mother did not see or communicate with the children for nearly two-and-a-half years. During the first fifteen months of her absence, Mother used drugs. After Mother “g[o]t clean” and returned to Indiana, she did not contact the children in any way—by letter, phone, or otherwise—for ten months. These findings lead to one conclusion—Mother did not have justifiable cause for not communicating with the children;

consequently, her consent to the adoption is unnecessary. We reverse the trial court and remand this case. On remand, the court must determine, among other things, whether adoption is in the best interests of the children.⁴ *See* Ind. Code § 31-19-11-1(a).

[19] Reversed and remanded.

Bradford, C.J., and Brown, J., concur.

⁴ Mother cross-appeals raising two issues. First, Mother argues the trial court should have consolidated the paternity case with the adoption case. Mother is correct that the paternity case should be consolidated with the adoption case; however, this just needs to happen “before [the court] issu[es] its adoption decree.” *In re Adoption of S.O.*, 56 N.E.3d 77, 84 (Ind. Ct. App. 2016). Here, the trial court denied Stepmother’s adoption petition and therefore no adoption decree has been issued. On remand, the trial court should consolidate the paternity case with the adoption case. *See id.* (explaining “an early consolidation will aid the adoption court’s decision”); *see also* Ind. Code § 31-19-2-14.

Second, Mother argues the trial court failed to comply with the statutory supervision requirements. Indiana Code section 31-19-8-1 states an adoption may be granted only after “a period of supervision . . . by a licensed child placing agency.” However, this period of supervision may be waived “if one (1) of the petitioners is a stepparent . . . of the child and the court waives the report under section 5(c) of this chapter.” Ind. Code § 31-19-8-2(c). Here, the trial court waived the report in November 2019. *See* Appellant’s App. Vol. II p. 16. Even though there has been a waiver, a criminal-history check is still required. *See* Ind. Code § 31-19-8-5(d). Accordingly, this requirement will have to be met before an adoption decree can be issued.