

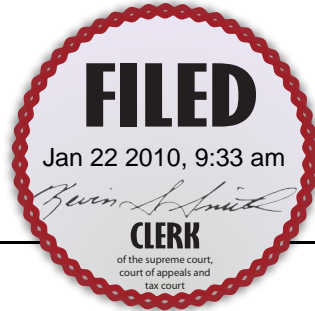
FOR PUBLICATION

ATTORNEY FOR APPELLANT:

CRAIG PERSINGER
Marion, Indiana

ATTORNEY FOR APPELLEE:

SHANE E. BEAL
Marion, Indiana



**IN THE
COURT OF APPEALS OF INDIANA**

IN RE THE ADOPTION OF J.C., Minor Child)
)
J.A.C.,)
)
Appellant-Respondent,)
)
vs.)
)
T.C.,)
)
Appellee-Petitioner.)

No. 27A02-0909-CV-896

APPEAL FROM THE GRANT CIRCUIT COURT
The Honorable Mark E. Spitzer, Judge
Cause No. 27C01-0808-AD-15

January 22, 2010

OPINION - FOR PUBLICATION

RILEY, Judge

STATEMENT OF THE CASE

Appellant-Respondent, J.A.C. (Natural Father), appeals the trial court's Decree of Adoption of the minor child J.C. in favor of Appellee-Petitioner, T.C. (Adoptive Father).

We affirm.

ISSUE

Natural Father raises one issue on appeal, which we restate as: Whether the trial court properly found that Natural Father's consent to the adoption of his minor child by Adoptive Father was not required pursuant to Indiana Code section 31-19-9-8(b).

FACTS AND PROCEDURAL HISTORY

Natural Father is the biological parent of J.C., born on November 14, 2004. M.C., Natural Mother, is the biological mother of J.C. and married to Adoptive Father. Natural Father and Natural Mother separated at the end of 2005. During their marriage, Natural Father provided care for J.C. which included feeding, bathing, and changing diapers. Natural Father worked and supported both Natural Mother and J.C. Upon separation, Natural Mother did not allow Natural Father to see J.C. until visitation was established through the trial court. Although Natural Father was initially diligent in exercising his visitation, his last visitation with J.C. occurred on February 14, 2008. She clarified that "[e]very visitation [Natural Father] was granted, [] was never for the full time. There was always something on his behalf that wasn't working out that [J.C.] needed picked up." (Transcript p. 34). Natural Mother also explained that since February 14, 2008, she had very sporadic contact with Natural Father and he never attempted to communicate directly with J.C.

Natural Father was ordered to pay child support in the amount of eighty dollars per week. Natural Father made child support payments in February, March, and November of 2006, March of 2007, and from August 17, 2007 through October 19, 2007. He has failed to fulfill any of his child support obligations since October 19, 2007. Between March of 2006 and August of 2007, Natural Father was incarcerated for sixty days on two separate occasions for failure to pay support.

Natural Father has been incarcerated since July 18, 2008, after a burglary conviction and has a scheduled release date of January 15, 2012. During his incarceration, Natural Father has attempted to get in touch with J.C. by sending cards and having a Christmas present delivered through a chaplaincy program. However, Natural Father received notice that the gift was refused because Natural Mother was unwilling to pick up the gift.

On August 26, 2008, Adoptive Father filed his Petition for Adoption of Minor Child J.C., together with the consent of Natural Mother. On September 11, 2008, Natural Father filed an objection to the Petition for Adoption. On May 13, 2009, after a hearing, the trial court entered its Decree of Adoption granting Adoptive Father's petition. In its Decree, the trial court found that

the [N]atural [F]ather, [], has been incarcerated, with a release date of 2012, due to a conviction for burglary. However, prior to his conviction, [Natural Father] had the ability to provide for his daughter and failed to do so. Further, [Natural Father] has had no substantial contact with his daughter in some time, and no contact whatsoever since February 2008. He apparently sent a few letters, but no further efforts have been made since that time. The [c]ourt finds that such efforts can at best be characterized as token efforts to support or communicate with [J.C.] and therefore the [c]ourt concludes that he has abandoned her within the meaning of I.C. [§] 31-19-

9-8(b). Accordingly, his consent to the adoption is not required. The biological mother of [J.C.] consents to and is supportive of [Adoptive Father's] adoption of the child.

The [c]ourt further finds that adoption of [J.C.] is in [J.C.'s] best interests and that the statutory requirements of I.C. [§] 31-19-11-1 have been met.

(Appellant's App. pp. 36-37).

Natural Father now appeals. Additional facts will be provided as necessary.

DISCUSSION AND DECISION

Natural Father contends that the trial court erred when it concluded that the natural father's consent to the adoption of his minor child was not required in accordance with Indiana Code section 31-19-9-8(b). Specifically, he asserts that Adoptive Father failed to prove by clear and convincing evidence that the statutory requirements were met.

When reviewing a trial court's ruling in an adoption proceeding, we will not disturb that ruling unless evidence leads to but one conclusion and the trial judge reached an opposite conclusion. *In re M.A.S.*, 815 N.E.2d 216, 218 (Ind. Ct. App. 2004). 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.* at 218-19. The decision of the trial court is presumed to be correct, and it is the appellant's burden to overcome that presumption. *Id.* at 219.

Indiana Code section 31-19-11-1 provides that the trial court "shall grant the petition for adoption and enter an adoption decree" if the court hears evidence and finds,

in part, that “proper consent, if consent is necessary, to the adoption has been given.”

According to Indiana Code section 31-19-9-8

(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.

* * *

(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.

Adoptive Father has the “burden of proving that the parent’s consent to the adoption [was] unnecessary.” Ind. Code § 31-19-10-1.2(a). Adoptive Father was required to meet his burden by proving by clear and convincing evidence that Natural Father’s consent was not required under I.C. § 31-19-9-8. *See In Re M.A.S.*, 815 N.E.2d at 220.

Here, based upon Natural Father’s failure to financially provide for J.C. and his lack of substantial contact with J.C., the trial court found that Natural Father had abandoned J.C. within the meaning of I.C. § 31-19-9-8(b). We note that the frequency of visits alone is an invalid basis for gauging whether significant communication has

occurred; instead, we must consider whether the communication was meaningful. *In re Adoption of J.P.*, 713 N.E.2d 873, 876 (Ind. Ct. App. 1999). Notwithstanding the parent's actual intent, a significant factor in this analysis is whether the parent carelessly and negligently failed to perform his parental duties. *Id.*

The evidence establishes that Natural Father failed in his parental duty to provide financial support for J.C. Specifically, during the hearing Natural Father's payment history was admitted which showed that he only made child support payments in February, March, and November of 2006, March of 2007, and from August 17, 2007 through October 19, 2007. Natural Father has failed to pay child support altogether since October 19, 2007. Furthermore, Natural Father admitted that between March of 2006 and August of 2007, he was incarcerated for sixty days on two separate occasions for failure to pay support.

With regard to Natural Father's contact with his minor child, we note that "the custodial parent's willingness to permit visitation as well as the natural parent's financial and physical means to accomplish his obligations" must be taken into account. *Rust v. Lawson*, 714 N.E.2d 769, 771 (Ind. Ct. App. 1999), *trans. denied*. "Efforts of a custodial parent to hamper or thwart communication between parent and child are relevant in determining the ability to communicate." *Id.* "Furthermore, under the present statute, the communication standard has an additional factor." *Id.* In order to preserve the consent requirement for adoption, the level of communication with the child must not only be significant, but it must also be more than 'token efforts' on the part of the parent to communicate with the child." *Id.* (citing I.C. § 31-19-9-8(b)). "The reasonable intent of

the statute is to encourage non-custodial parents to maintain communication with their children and to discourage non-custodial parents from visiting their children just often enough to thwart the adoptive parents' efforts to provide a settled environment for the children." *Id.*

Adoptive Father testified that Natural Father was diligent in exercising his visitation until February 14, 2008, when all visits ceased. However, Natural Mother stated that every visitation Natural Father was granted was never for the entire time; there was "always something on his behalf that wasn't working out [and] that [J.C.] needed picked up." (Tr. p. 34). She also clarified that Natural Father did not have a driver's license and had transportation problems. This resulted in Natural Mother driving J.C. to the visitation and picking J.C. up afterwards.

Natural Father was incarcerated on July 18, 2008, and has a scheduled release date of January 15, 2012. We observed in *Lewis v. Roberts*, 495 N.E.2d 810, 813 (Ind. Ct. App. 1986), that "[i]mprisonment standing alone does not establish statutory abandonment." However, "[n]either should confinement alone constitute justifiable reason for failing to maintain significant communication with one's child." *Id.* Incarceration "unquestionably alters the means for significant communication." *Id.* "What constitutes insignificant communication with a free parent may be significant in relation to an incarcerated parent with limited access to his child." *Id.*

Here, Natural Father explained that he tried to get in touch with J.C. during his incarceration by sending cards and having a Christmas present delivered through a chaplaincy program. However, Natural Father received notice that the gift was refused

because Natural Mother was unwilling to pick up the gift. On the other hand, Natural Mother testified that besides a single letter addressed to her, she never received any cards sent by Natural Father to J.C. She stated that she was not aware of any attempts on his part to communicate directly with J.C. besides the indirect unsuccessful delivery of a Christmas present through a chaplaincy program.

Based on the totality of the evidence before us, we agree with the trial court that Natural Father's consent to the adoption is not required as he has clearly abandoned his minor child within the requirements of I.C. § 31-19-9-8(b). Even prior to his incarceration, Natural Father's interaction with J.C. was limited, not taking advantage of the full visitation time that he was granted and stopping all visitation on February 14, 2008, a full five months before his incarceration. Even during his incarceration, his efforts to communicate with J.C. were almost non-existent and failed to amount to a sincere attempt to stay involved in J.C.'s life. *See Williams v. Townsend*, 629 N.E.2d 252, 254 (Ind. Ct. App. 1994) (holding that the father's communications were token efforts where he sent an occasional letter or card while incarcerated and took no legal

action to enable visitation or communication). Therefore, we affirm the trial court's decision.

CONCLUSION

Based on the foregoing, we conclude that the trial court properly concluded that Natural Father's consent was not required to the adoption of his minor child.

Affirmed.

VAIDIK, J., concurs.

CRONE, J., concurs in result.