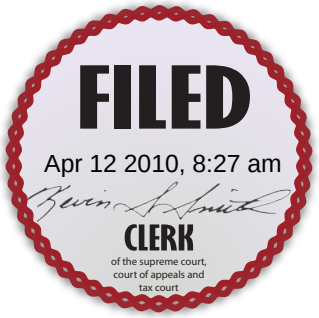

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IN THE
COURT OF APPEALS OF INDIANA

IN RE THE MATTER OF ADOPTION OF A.M.W., a minor,	)	
A.W., Appellant,	)	
vs.	)	No. 02A03-0912-CV-601
D.D.L., Appellee.	)	

APPEAL FROM THE ALLEN SUPERIOR COURT
The Honorable Charles F. Pratt, Judge
Cause No. 02D07-0809-AD-128

April 12. 2010

MEMORANDUM DECISION – NOT FOR PUBLICATION

MATHIAS, Judge

The Allen Superior granted D.L.'s verified petition to adopt A.M.W. over the biological father's, A.W.'s, objection after concluding that A.W.'s consent to the adoption was not required. A.W. appeals and argues that the trial court's finding that his consent to the adoption was not required is not supported by clear and convincing evidence. Concluding that the evidence more than supports the conclusion that A.W. failed to significantly communicate with the child for at least one year, we affirm.

Facts and Procedural History

A.M.W. was born on June 13, 2002, to A.M.L. ("Mother") and A.W. Shortly thereafter, A.W. signed a paternity affidavit pursuant to Indiana Code section 16-37-2-2.1. Mother and A.W. did not reside together on the date of A.M.W.'s birth. However, they briefly lived together from November, 2002, until August, 2003. After they separated, Father visited with Mother and A.M.W. in September, 2003. He also attempted to see the child in June 2004, but A.M.W. was sleeping. A.W. was told he could return in an hour to see the child, and A.W. left but never returned.

Mother remained in the residence she shared with A.W. until April 2005. Since A.M.W.'s birth, Mother has been employed at the same company in the same location. This information was known to A.W. A.W. never contacted Mother at her place of employment. Further, A.W. has not provided for A.M.W.'s support since he and Mother separated in 2003.

On November 5, 2005, Mother married D.L. On September 4, 2008, D.L. filed a petition to adopt A.M.W. and Mother consented to the adoption. On October 3, 2008,

A.W. filed his objection to the adoption. A.W. is currently incarcerated serving a sixty-three-year prison sentence for murder, criminal recklessness, and possession of a handgun without a license.[1] His earliest possible release date is in 2039.

A hearing was held on D.L.'s petition to adopt A.M.W. on July 2, 2009. At the hearing, the adoption director for Lutheran Social Services of Indiana recommended that the court grant D.L.'s petition to adopt A.M.W. Evidence at the hearing established that D.L. and A.M.W. have a father-son relationship, and D.L. is involved in the child's sports and church activities.

On August 11, 2009, the trial court issued its decree granting D.L.'s petition to adopt A.M.W. after concluding that A.W.'s consent to the adoption was not required because for more than one year A.W. 1) failed to provide for the care and support of A.M.W. even though he was able to do so, and 2) failed to significantly communicate with A.M.W. without justifiable cause. Appellant's App. p. 11. The court also concluded that the A.M.W.'s "best interests are served by granting the adoption." Id. at 12. A.W. now appeals.

Standard of Review

When we review 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 court 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

[1] A.W. was sentenced on May 30, 2008. Appellant's App. p. 5.

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.

Discussion and Decision

Pursuant to Indiana Code section 31-19-9-8 (2008), consent to an adoption is not required from a parent who, for at least one year, "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." The adoptive parent bears "burden of proving that the parent's consent to the adoption [was] unnecessary." Ind. Code §31-19-10-1.2(a) (2008). The adoptive parent is required to meet this burden by proving by clear and convincing evidence that the biological parent's consent was not required under section 31-19-9-8.[2] See In re M.A.S., 815 N.E.2d at 220.

A.W. argues that the trial court's finding that he failed to communicate significantly with A.M.W. is not supported by clear and convincing evidence. In resolving this issue, "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, 772 (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.

[2] A.W. asserts that the adoptive parent is required to meet his or her burden of proof with "clear, cogent, and indubitable evidence." Appellant's Br. at 6. Our court rejected this same argument in In re M.A.S. and held that the applicable standard is "clear and convincing evidence." 815 N.E.2d at 220.

"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.

A.W. argues that he was unable to significantly communicate with A.M.W. because Mother interfered with his ability to communicate with the child. In support of his argument, A.W. cites to Mother's change of address in 2005, and the fact that her new address and phone number were unlisted. He also relies on the testimony of various relatives who stated that they contacted Mother at her workplace to aid A.W. in arranging visitation with the child, but alleged that Mother never responded to their inquiries.

A.W.'s argument is merely a request to our court to reweigh the evidence and credibility of the witnesses, which we will not do. Although Mother changed addresses, she has been employed with the same company in the same location since her separation from A.W. Prior to his incarceration, A.W. could have, but failed to contact Mother at her place of employment. If he desired to communicate with A.M.W. or arrange for visitation with the child, it was possible to do so. Further, the trial court found "Mother's testimony to be credible that she has not received any messages nor was she made aware of any contact by [A.W.'s] relatives except for a contact by a cousin in the summer of

2006." Appellant's App. p. 10. Mother testified that she gave A.W.'s cousin a picture of A.M.W. and her business card, but that A.W. failed to contact her. Tr. pp. 33-34.

Under these facts and circumstances, we conclude that the trial court's finding that A.W. failed to significantly communicate with A.M.W. for a least one year is supported by clear and convincing evidence.[3] We therefore affirm the trial court's decision to grant D.L.'s petition to adopt A.M.W.

Affirmed.

RILEY, J., and BRADFORD, J., concur.

[3] A.W. also argues that trial court erred in finding that he knowingly failed to provide for the care and support of A.M.W. when he was able to do so as required by law or judicial decree. Because clear and convincing evidence supports the trial court's conclusion that A.W. knowingly failed to significantly communicate with A.M.W. for at least one year, we do not address this issue. Pursuant to Indiana Code section 31-19-9-8(a)(2), parental consent is not required if only one of the two criteria is met. Therefore, we have confined our discussion to the issue of significant communication. Nevertheless, we note that A.W. testified that he was employed at various companies, and admitted that he "had income to pay support." Tr. p. 47.