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.

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IN THE COURT OF APPEALS OF INDIANA

K.F. and R.H.,

Appellants-Petitioners,

v.

J.A.P. and B.B.,

Appellees-Respondents

December 21, 2021

Court of Appeals Case No. 21A-AD-1266

Appeal from the Monroe Circuit Court

The Honorable Stephen R. Galvin, Judge

Trial Court Cause No. 53C07-2008-AD-55

Vaidik, Judge.

Case Summary

[1] In June 2019, J.A.P. ("Mother"), who was sixteen years old, and B.B. ("Father"), who was nineteen years old, had a baby ("Child"). R.H. and K.F. ("Adoptive Parents") obtained Mother's and Father's consent for adoption, filed a petition to adopt Child in Monroe Circuit Court, and were awarded temporary custody of Child. The trial court later found Mother's and Father's consents to be invalid and denied Adoptive Parents' adoption petition. We affirmed on appeal, and Adoptive Parents sought transfer. While transfer was still pending, Adoptive Parents filed a second petition to adopt Child—this time in Allen Superior Court—alleging they didn't need Mother's and Father's consent because for at least one year they (1) failed without justifiable cause to communicate significantly with Child when able to do so and (2) knowingly failed to provide for the care and support of Child when able to do so as required by law or judicial decree. The Allen Superior Court, on its own motion, transferred the case to Monroe Circuit Court, and it was assigned to the same judge who had denied the first adoption petition. Adoptive Parents moved for a change of judge under Indiana Trial Rule 76, which the trial court denied. After a hearing, the court found Adoptive Parents failed to meet their burden and dismissed the second adoption petition. Finding Adoptive Parents were not entitled to a change of judge under Trial Rule 76 and that they did not prove by clear and convincing evidence that for at least one year Mother and Father failed to significantly communicate with or support Child, we affirm the trial court.

Facts and Procedural History

[2] Mother and Father (collectively "Parents"), who live in Bloomington, started dating in 2017. Mother gave birth to their first child in February 2018, when she was fifteen and Father was seventeen. In August, Mother became pregnant with their second child ("Child"). Parents contemplated adoption because of the financial burden of a second child and contacted an adoption agency.

[3] On May 29, 2019, Adoptive Parents, who live in Fort Wayne and were represented by the adoption agency, filed a petition to adopt Parents' soon-to-be-born baby in Monroe Circuit Court 7. *See* Cause No. 53C07-1905-AD-50. Child was born on June 1, when Mother was sixteen and Father was nineteen. Parents signed consents for the adoption of Child, and Child left the hospital with Adoptive Parents. Shortly thereafter, Parents changed their minds, and on June 3 they filed a document in the trial court asking the court to return Child to them. The court awarded temporary custody of Child to Adoptive Parents pending further hearing and ordered Adoptive Parents to be "financially responsible" for Child. Appellants' App. Vol. II p. 89; *see* Ind. Code § 31-19-2-13(c) ("[I]f temporary custody is granted under this section, the petitioner or petitioners for adoption are legally and financially responsible for the child until otherwise ordered by the court.").

[4] In August 2019, a hearing was held to determine whether Parents' consents for the adoption of Child were valid. On September 16, the trial court denied Adoptive Parents' petition to adopt Child. The order provides, in relevant part:

8. [Mother] and [Father] were ignorant of the full import and consequences of signing the consents for adoption. They did not understand that the consents, once signed, were irrevocable and final. [Mother] and [Father] both believed that [the adoption-agency attorney] was their attorney. They believed he was acting on their behalf and protecting their interests. Based on statements by [the adoption-agency attorney], both believed at the time of signing that the adoption could be stopped prior to filing. [Mother] and [Father] were denied knowledge of essential facts necessary to make voluntary decisions and misled by the statements of an individual they believed to be their attorney.

9. [Father] and [Mother] both testified that [the adoption-agency attorney] created the impression that he was their attorney and was representing them in the adoption. [The adoption-agency attorney] was a long time, trusted friend of [Father's] mother and father. He was the best man in [Father's] father's wedding. [Father] had known him all his life. After he was contacted by [Father's] mother, [the adoption-agency attorney] contacted [Father] and [Mother] and offered to help them. He drafted an Agreed Entry of Emancipation for [Mother]. He offered to guide [Mother] and [Father] through the adoption process. Crucially, he never told them that he was not representing them and that he was representing the potential adoptive parents.

10. Through his actions, [the adoption-agency attorney] created and confirmed the false impression that he was acting as the attorney for [Father] and [Mother]. He failed to adequately disclose the fact that he was representing [Adoptive Parents] to [Mother] and [Father].

* * * * *

24. Given the totality of the circumstances, it is clear that [Parents] did not make informed, voluntary decisions to consent

> to the adoption of their child. [Parents] have proven, by clear and convincing evidence, that their consents were not voluntary. Therefore, the Consents to adoption are invalid.

Appellants' App. Vol. II pp. 108, 110. The court ordered Adoptive Parents to return Child to Parents by 5 p.m. on September 23. *See id.* at 111.

[5] On September 17, Adoptive Parents filed a Notice of Appeal. That same day, they asked the trial court to allow Child to live with them pending appeal. The court denied their request. On September 18, Adoptive Parents filed a Motion to Stay Order to Return Child Pending Appeal with this Court. *See* Case No. 19A-AD-2162. This Court's motions panel, in a divided vote, granted Adoptive Parents' motion to stay, and Child lived with them pending appeal. Meanwhile, Parents sought parenting time with Child. On December 12, the trial court awarded Parents five hours of parenting time with Child, then six months old, every Sunday starting December 15. *See* Appellants' App. Vol. III pp. 26-27. Because of the distance between Bloomington and Fort Wayne, the court ordered the first two parenting times to occur at Adoptive Parents' home in Fort Wayne ("to minimize the impact on the child") but the remaining parenting times to occur in Anderson. *Id.* at 26.

[6] On March 25, 2020, this Court issued an opinion affirming the trial court's denial of Adoptive Parents' petition to adopt Child. *See K.F. v. B.B.*, 145 N.E.3d 813 (Ind. Ct. App. 2020), *trans. denied*. Parents sought to lift the stay, which Adoptive Parents opposed because they planned to seek transfer. We denied Parents' motion, and Child was allowed to keep living with Adoptive Parents.

Thereafter, Adoptive Parents filed a petition to transfer with the Indiana Supreme Court.

[7] On June 15—while transfer was still pending before our Supreme Court—Adoptive Parents filed a second petition to adopt Child—not in the existing adoption cause number in Monroe Circuit Court 7 but in Allen Superior Court. *See* Cause No. 02D08-2006-AD-100. In this petition, they argued Parents' consent to the adoption was not required because for at least one year Parents (1) failed without justifiable cause to communicate significantly with Child when able to do so and (2) knowingly failed to provide for the care and support of Child when able to do so as required by law or judicial decree. Appellants' App. Vol. II p. 35 (citing I.C. § 31-19-9-8(a)(2)).

[8] On July 9, our Supreme Court unanimously denied transfer. Based on the denial of transfer, Parents filed a motion in Monroe Circuit Court 7 seeking the immediate return of Child, who was then thirteen months old. That motion was still pending when, on August 3, the Allen Superior Court issued the following order regarding Adoptive Parents' second adoption petition:

> After review and consultation with the Hon. Steven Galvin, Judge of the Monroe Circuit Court, THIS Court, on its own motion, orders the case venued to the Monroe Circuit Court.

Appellants' App. Vol. III p. 39. Three days later, on August 6, Monroe Circuit Court 7 established a schedule for the gradual return of Child to Parents under Cause AD-50 (according to this schedule Parents obtained full custody of Child on October 2, 2020, where he has since remained). *See id.* at 78.

[9] On August 17, the Allen Superior Court case was "venued out" of Allen County; three days later, on August 20, it was "venued in" to Monroe County. The case was docketed in the same court, Monroe Circuit Court 7, but under a new cause number. *See* Cause No. 53C07-2008-AD-55. On August 25, Adoptive Parents moved for a change of judge under Indiana Trial Rule 76(B). Appellants' App. Vol. III pp. 46-47. Following a hearing, the trial court denied Adoptive Parents' motion:

> 19. The issues were first closed on the merits – and the 10 day period to file for a mandatory change of judge was initiated – on August 12, 2020. [Adoptive Parents] did not file their motion until August 25, more than 10 days after. Thus, their motion for change of venue from the judge pursuant to Trial Rule 76(C) was not timely filed.
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> 20. At the hearing on September 22, 2020, [Adoptive Parents argued] that their motion was timely pursuant to Trial Rule 76(C)(4). In making this argument, [they] assume that the transfer of this case from Allen County to Monroe County was a "change of judge or county" pursuant to Trial Rule 76. This assumption is incorrect.
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> 21. On August 3, 2020, Judge Charles Pratt, **on his own motion**, and after consultation with this court, venued the case to Monroe County because Monroe County had a pre-existing adoption case involving the same parties. This transfer was not made pursuant to Trial Rule 76.

Appellants' App. Vol. II pp. 18-19. Adoptive Parents requested parenting time with Child pending resolution of their second adoption petition, which the trial court denied.

[10] The case then proceeded to the merits of Adoptive Parents' second adoption petition, and a hearing was held in May 2021. Following the hearing, the trial court issued an order finding Adoptive Parents did not prove by clear and convincing evidence that for at least one year Parents failed without justifiable cause to communicate significantly with Child when able to do so and knowingly failed to provide for the care and support of Child when able to do so as required by law or judicial decree. Regarding failure to communicate, the court found:

> 4. Once [Parents] were granted parenting time with [Child], they visited to the best of their ability.[1] From December 15, 2019 [Parents' first parenting time with Child] until October 2, 2020 [when Parents received full custody of Child], Parents attended approximately half their scheduled visits with [Child]. That these visitations were difficult for parents of [Mother's and Father's] limited means is obvious. For their first two visits, they were required to travel 360 miles round-trip to Fort Wayne, Indiana. Subsequent visits were held in Anderson, Indiana. When [Father] did not have a valid driver's license, they were forced to find relatives willing to provide transportation. Visits were often missed due to [Father's] work schedule or because [Father's] mother was not available to provide transportation.

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[1] On appeal, Adoptive Parents challenge this single sentence, arguing the evidence doesn't support it because Parents couldn't remember why they missed some of the visits (and therefore they couldn't have visited to the best of their ability). Even if we disregarded this sentence, the other findings are sufficient to support the trial court's conclusion regarding failure to communicate.

> 5. During visits, [Parents] fed [Child], played with him, and interacted with him; They brought their older child . . . to visit [Child].
>
> * * * * *
>
> 7. Beginning December 1[5], 2019, [Parents] engaged in significant and ongoing communication with [Child].
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> 8. [Adoptive Parents] have failed to prove, by clear and convincing evidence, [Parents] failed, without justifiable cause, to communicate with [Child] for at least one year.

Id. at 26-27. Regarding failure to support, the court found:

> 16. . . . It is undisputed that [Parents] gave [Adoptive Parents] a blanket and pacifier at the hospital following [Child's] birth; a stuffed elephant and blanket on December 15, 2019; and an outfit on December 22, 2019. . . .
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> * * * * *
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> 18. . . . [In 2020 Parents] bought an Easter basket containing rattles, a book, a toothbrush, stuffed animals and baby food for [Child]. They bought a T-shirt for [Child] at Kohl's. They provided these items to [Adoptive Parents]. They also purchased diapers and formula for [Child]. [Parents] also incurred expenditures in obtaining transportation to and from parenting time with [Child]. They reimbursed [Father's] mother for gas. These expenditures were clearly made in [Child's] best interest and on his behalf.
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> 19. [Parents] also bought a car seat, a crib, a pack and play, a bassinet, and a double stroller for [Child]. They did not provide

> these items to [Adoptive Parents] because they reasonably believed that [Child] would soon be returned to their care. They were clearly attempting to provide for [Child's] care and support by purchasing these items in anticipation of his imminent return. . . .
>
> 20. Considering the totality of the circumstances, it is clear that [Adoptive Parents] have failed to prove, by clear and convincing evidence, [Parents] failed to provide for the care and support of [Child] for at least one year when able to do so.

Id. at 28-29. Accordingly, the trial court found Parents' consent to the adoption of Child was required and dismissed Adoptive Parents' second adoption petition.

[11] Adoptive Parents now appeal the trial court's denial of their motion for change of judge and dismissal of their second adoption petition.

Discussion and Decision

I. Motion for Change of Judge

[12] Adoptive Parents contend their motion for change of judge was timely under Trial Rule 76(C)(4), which provides, in part, that "in the event a change is granted from the judge or county within the prescribed period, as stated above, a request for a change of judge or county may be made by a party still entitled thereto within ten [10] days after the special judge has qualified or the moving party has knowledge the cause has reached the receiving county or there has been a failure to perfect the change." They point out they filed their motion on

August 25, 2020, just five days after the Allen County case was "venued in" to Monroe County. The trial court denied the motion because a change of county triggers Trial Rule 76(C)(4) only if the change is made under Trial Rule 76(A), which is limited to circumstances not present here: when "the county where suit is pending is a party or that the party seeking the change will be unlikely to receive a fair trial on account of local prejudice or bias regarding a party or the claim or defense presented by a party."

[13] We need not decide whether Trial Rule 76(C)(4) is limited to changes of county under Trial Rule 76(A), because we affirm the denial of Adoptive Parents' motion for a more fundamental reason. That is, given the existence of the Monroe County case—Cause AD-50—the Allen County case—Cause AD-100—should have been dismissed outright under Trial Rule 12(B)(8)[2] or at the very least consolidated into the existing Monroe County case (Cause AD-50) under Trial Rule 42.[3] If one of those things had been done, the only case

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[2] Trial Rule 12(B)(8) allows for the dismissal of an action when "[t]he same action [is] pending in another court of this state." *See Beatty v. Liberty Mut. Ins. Grp.*, 893 N.E.2d 1079, 1084 (Ind. Ct. App. 2008) ("Trial Rule 12(B)(8) implements the general principle that, when an action is pending in an Indiana court, other Indiana courts must defer to that court's authority over the case. The rule applies where the parties, subject matter, and remedies are precisely the same, and it also applies when they are only substantially the same." (citations omitted)). On the same day the Allen Superior Court transferred the case to Monroe County on its own motion, Parents filed a motion seeking dismissal of Cause AD-100 under Trial Rule 12(B)(8), but it appears this motion was never ruled upon. *See* Appellant's App. Vol. III p. 28. Adoptive Parents argue dismissal under Trial Rule 12(B)(8) was not appropriate because Cause AD-100 was not the "same action" as Cause AD-50, as Cause AD-100 involved an adoption without consent and Cause AD-50 involved an adoption with consent. Because the adoptions involved the same natural parents, child, and adoptive parents, they are the "same action."

[3] Trial Rule 42(A) and (D) provide for the consolidation of civil actions "involving a common question of law or fact."

remaining would have been Cause AD-50, and a change of judge would have been completely off the table because Cause AD-50 had been pending for more than a year.[4] Instead, the Allen Superior Court "venued" the case to Monroe County, and Monroe Circuit Court 7 allowed the case to proceed on its own, as Cause AD-55. But the fact that Cause AD-100/AD-55 wasn't dismissed or consolidated into Cause AD-50 doesn't change the fact that it was, for all intents and purposes, a continuation of Cause AD-50. And because Adoptive Parents would not have been entitled to a change of judge in Cause AD-50, they were not entitled to a change of judge under Cause AD-55. To hold otherwise would be to elevate form over substance and sanction judge shopping. For this reason, we affirm the trial court's denial of Adoptive Parents' motion for change of judge.

II. Consent

[14] Next, Adoptive Parents contend the trial court erred in dismissing their second adoption petition. We give "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) (quotation omitted). "So, when reviewing an adoption case, we presume that the trial

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[4] Generally, motions for change of judge must be made "not later than ten [10] days after the issues are first closed on the merits." Ind. Trial Rule 76(C).

court's decision is correct, and the appellant bears the burden of rebutting this presumption." *Id.* (quotation omitted). "And we will not disturb that decision unless the evidence leads to but one conclusion and the trial judge reached an opposite conclusion." *Id.* (quotation omitted). We will not reweigh evidence or assess witness credibility. *Id.* Rather, we examine the evidence in the light most favorable to the trial court's decision. *Id.*

[15] Generally, a trial court may grant an adoption petition only if both parents consent. *See* I.C. § 31-19-9-1(a)(2). However, parental consent may be dispensed with under "carefully enumerated circumstances." *I.B.*, 163 N.E.3d at 274. Specifically, Indiana Code section 31-19-9-8(a) provides consent is not required from:

> (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.

The petitioner must prove the parent's consent is unnecessary by clear and convincing evidence. *I.B.*, 163 N.E.3d at 274 (citing I.C. §§ 31-19-10-0.5, -1.2(a)).

A. Failure to Communicate under Section 31-19-9-8(a)(2)(A)

[16] Adoptive Parents argue the trial court erred in determining they did not prove by clear and convincing evidence that for at least one year Parents failed without justifiable cause to communicate significantly with Child when able to do so. "A determination on the significance of the communication is not one that can be mathematically calculated to precision." *Id.* at 276 (quotation omitted). Indeed, "[e]ven multiple and relatively consistent contacts may not be found significant in context." *Id.* (quotation omitted). But "a single significant communication within one year is sufficient to preserve a non-custodial parent's right to consent to the adoption." *Id.* (quotation omitted).

[17] Here, the record shows Parents have been trying to get Child back essentially since he was born on June 1, 2019. Even though the trial court denied Adoptive Parents' first adoption petition on September 16, 2019, and this Court affirmed the trial court on March 25, 2020, Child was allowed to live with Adoptive Parents until our Supreme Court made a decision regarding transfer (which it denied on July 9, 2020). During this time, Parents, still teenagers,[5] were awarded parenting time with Child for five hours every Sunday. However, Parents had to travel from Bloomington to either Fort Wayne (a 360-mile roundtrip) or Anderson to see Child. Mother didn't have a driver's license, and Father's license was suspended for part of this time. As a result, Parents had to

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[5] Father turned twenty on April 8, 2020. Mother turns twenty on August 6, 2022.

rely on others for transportation. When the visits were in Anderson, Parents had to exercise their parenting time in a restaurant or store. Notably, this occurred during the early stages of the COVID-19 pandemic. In all, Parents saw Child approximately thirteen times—which the trial court found to be "approximately half their scheduled visits"—between December 2019 (when Parents had their first parenting time with Child) and June 2020 (when Adoptive Parents filed their second adoption petition).[6] Given these circumstances, we agree with the trial court that Adoptive Parents did not prove by clear and convincing evidence that for at least one year Parents failed without justifiable cause to communicate significantly with Child when able to do so.

B. Failure to Support under Section 31-19-9-8(a)(2)(B)

[18] Adoptive Parents also argue the trial court erred in determining they did not prove by clear and convincing evidence that for at least one year Parents knowingly failed to provide for the care and support of Child when able to do so as required by law or judicial decree.

[19] When Adoptive Parents were awarded temporary custody of Child on June 6, 2019, the trial court ordered them to financially support Child. Parents were

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[6] According to the trial court's findings, visits occurred on December 15, 2019 (Fort Wayne), December 22, 2019 (Fort Wayne), December 29, 2019 (Anderson), January 5, 2020 (Anderson), January 19, 2020 (Anderson), January 26, 2020 (Anderson), March 1, 2020 (Anderson), March 22, 2020 (Fort Wayne), April 12, 2020 (Anderson), May 17, 2020 (Anderson), May 31, 2020 (Anderson), June 21, 2020 (Anderson), and June 28, 2020 (Anderson).

neither ordered by the court to pay any support for Child nor asked by Adoptive Parents to pay any support. Nevertheless, Indiana law imposes a duty upon parents to support their children, and this duty exists apart from any court order or statute. *See Irvin v. Hood,* 712 N.E.2d 1012, 1014 (Ind. Ct. App. 1999). Consequently, Parents still had a duty to support Child. But because the trial court did not order Parents to pay any support, their duty of support can be defined in nonmonetary terms. *See In re Adoption of N.W.*, 933 N.E.2d 909, 914 (Ind. Ct. App. 2010) (holding that because the mother had a "negative" child-support obligation, her duty to support her child could be defined in nonmonetary terms and concluding the mother supported her child in nonmonetary terms by providing necessities during parenting time), *adopted by* 941 N.E.2d 1042 (Ind. 2011).

[20] Here, Parents, who were teenagers when they were awarded parenting time with Child in December 2019, had minimal income and another young child at home.[7] As the trial court found, Parents purchased items for Child, including clothing and toys, that they gave to Adoptive Parents. Parents also provided formula, diapers, and food during parenting time, paid for transportation to and from parenting time, and bought items, including a crib and double stroller, for

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[7] Adoptive Parents argue the trial court erred in finding that in 2019 Parents' combined incomes did not cover their expenses. Adoptive Parents note Parents didn't have their own place—and thus didn't have to pay rent —until May 2020 and therefore should have had extra money to support Child. Adoptive Parents, however, don't challenge the trial court's other findings that Mother earned $180 per week during the last seven months of 2019 and that Father earned $14,000-$15,000 in 2019.

their home (where Child has lived since October 2020) in anticipation of Child's return. Based on this evidence, we agree with the trial court that Adoptive Parents did not prove by clear and convincing evidence that for at least one year Parents knowingly failed to provide for the care and support of Child when able to do so as required by law or judicial decree.

[21] Affirmed.

[22] Najam, J., and Weissmann, J., concur.