

## MEMORANDUM DECISION

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## IN THE COURT OF APPEALS OF INDIANA

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In the Matter of the Adoption of  
K.M.T.S. (Minor Child);

B.S. (Father),

*Appellant-Respondent,*

v.

R.F.,

*Appellee-Petitioner.*

November 20, 2023

Court of Appeals Case No.  
23A-AD-1362

Appeal from the Henry Circuit  
Court

The Honorable Bob A. Witham,  
Judge

Trial Court Cause No.  
33C01-2107-AD-29

**Memorandum Decision by Judge Tavitias**  
Judges Pyle and Foley concur.

**Tavitias, Judge.**

## Case Summary

- [1] B.S. (“Father”) appeals the trial court’s order granting the petition of R.F. (“Stepfather”) to adopt B.S.’s biological child, K.S. (“Child”). Father claims that the trial court clearly erred by concluding that Father’s consent to the adoption was not required. We disagree and, accordingly, affirm.

## Issue

- [2] Father presents one issue, which we restate as whether the trial court clearly erred by concluding that Father’s consent to the adoption was not required.

## Facts

- [3] Father and T.F. (“Mother”) were in a relationship, and both were addicted to drugs. They were “on the run” due to Father’s pending criminal charges, and Mother became pregnant. Tr. Vol. II p. 15. Father and Mother were apprehended in Texas in September 2017, and Child was born in May 2018.<sup>1</sup> Father was convicted of distributing methamphetamine and is incarcerated in federal prison with a release date of January 2030.<sup>2</sup>

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<sup>1</sup> Paternity was established in December 2019.

<sup>2</sup> Mother pleaded guilty to lesser charges and served three years on probation. Mother testified that she has been sober for five years.

- [4] Father has a lengthy criminal history and multiple pending state court charges. Additionally, Father has five other children, all of whom were deemed children in need of services and were adopted.
- [5] When Child was a few months old, Mother and Child visited Father in prison approximately three times. On the last visit in November 2018, according to Mother, Father attempted to have Mother traffic drugs to him, and Mother refused to return for further visits. Father claims that Mother brought drugs to the prison and was caught throwing the drugs in the trash and that Mother is banned from visiting the prison.
- [6] Due to misconduct issues, Father was in solitary confinement and had no phone privileges from November 2018 until August 2019. Father also lost his phone privileges in January 2020, and those phone privileges had not been restored at the time of the hearing on this matter. According to Father, he spent “years locked in a cell for 24 hours a day for seven (7) days a week” without phone privileges. *Id.* at 49.
- [7] Mother acknowledges that Father sent a letter to Child in approximately November 2018. According to Mother, she did not receive further communications from Father until after the adoption petition was filed, when Father sent two additional communications. According to Father, however, he has written “probably . . . over 100 letters” since November 2018 without a response. *Id.* at 46.

[8] Mother married Stepfather in June 2021. In July 2021, Stepfather filed a petition to adopt Child. Father filed a motion to contest the adoption, and a hearing was held on the matter on April 25, 2022. Stepfather argued that Father's consent was not necessary under Indiana Code Section 31-19-9-8(a)(2) because Father failed to communicate with Child for more than twelve months and under Indiana Code Section 31-19-9-8(a)(11) because Father is unfit to parent Child.

[9] On May 18, 2023, the trial court entered findings of fact and conclusions thereon finding that Father's consent was not necessary and granting Stepfather's petition for adoption as follows:

9. The Court finds little if any effort has been made by Father to communicate or support the child. Two (2) correspondences from Father sent to Mother were presented to the Court (Petitioner's Exhibits 2 and 3), neither of which include any direct message for the child. The Court finds any efforts to support or communicate with the child to be "token efforts."

10. Further, Father's behavior while incarcerated limited his ability to communicate with the minor child. Mother testified that, in November 2018 during a contact visit with the minor child at the federal facility where Father was housed at the time, Father requested Mother traffic contraband to him. As a result, Father had administrative consequences and Mother no longer wished to visit Father.

11. While the Court acknowledges Father will be incarcerated until at least 2030, Father did not present any evidence regarding efforts to support the minor child.

12. Indiana Code 31-19-9-8(a)(11) states that consent to adoption is not required of the following: “A parent if (A) a petition for adoption proves by clear and convincing evidence that the parent is unfit to be a parent and (B) the best interests of the child sought to be adopted would be served if the Court dispensed with the parent’s consent.”

13. Based upon the facts and evidence presented and upon the findings contained herein, the Court finds by clear and convincing evidence that Father is unfit to be a parent and the best interests of the minor child would be served if the Court dispensed with Father’s consent.

Appellant’s App. Vol. II pp. 39-40. Father now appeals.

## **Discussion and Decision**

[10] Father challenges the trial court’s determination that his consent to the adoption was not required. We first note that Stepfather did not submit an appellee’s brief. “[W]here, as here, the appellees do not submit a brief on appeal, the appellate court need not develop an argument for the appellees but instead will ‘reverse the trial court’s judgment if the appellant’s brief presents a case of prima facie error.’” *Salyer v. Washington Regular Baptist Church Cemetery*, 141 N.E.3d 384, 386 (Ind. 2020) (quoting *Front Row Motors, LLC v. Jones*, 5 N.E.3d 753, 758 (Ind. 2014)). “Prima facie error in this context means ‘at first sight, on first appearance, or on the face of it.’” *Id.* This less stringent standard of review relieves us of the burden of controverting arguments advanced in favor of reversal where that burden properly rests with the appellee. *See, e.g., Jenkins v. Jenkins*, 17 N.E.3d 350, 352 (Ind. Ct. App. 2014). We are obligated,

however, to correctly apply the law to the facts in the record in order to determine whether reversal is required. *Id.*

[11] Our Supreme Court has explained that appellate courts should “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. v. D.F.*, 93 N.E.3d 759, 762 (Ind. 2018)). “So, ‘when reviewing an adoption case, we presume that the trial court’s decision is correct, and the appellant bears the burden of rebutting this presumption.’” *Id.* (quoting *E.B.F.*, 93 N.E.3d at 762). “[W]e will not disturb that decision ‘unless the evidence leads to but one conclusion and the trial judge reached an opposite conclusion.’” *Id.* (quoting *In re Adoption of T.L.*, 4 N.E.3d 658, 662 (Ind. 2014)).

[12] In an adoption case, a 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 there is no evidence supporting the findings or the findings fail to support the judgment.” *Id.* On appeal, we will neither reweigh evidence nor assess the credibility of witnesses; instead, we consider the evidence in the light most favorable to the trial court’s decision. *I.B.*, 163 N.E.3d at 274 (citing *T.L.*, 4 N.E.3d at 662).

[13] Father argues that the trial court clearly erred in concluding that Father’s consent to the adoption was not required. “In general, ‘a petition to adopt a child who is less than eighteen (18) years of age may be granted only if written consent to adoption has been executed by . . . [t]he mother of a child born out of wedlock and the father of a child whose paternity has been established. . . .’” *In re Adoption of C.W.*, 202 N.E.3d 492, 495 (Ind. Ct. App. 2023) (citing Ind. Code § 31-19-9-1(a)(2)). “[U]nder carefully enumerated circumstances,’ however, the adoption statutes allow ‘the trial court to dispense with parental consent and allow adoption of the child.’” *Id.* (quoting *I.B.*, 163 N.E.3d at 274).

[14] At issue here are the following circumstances enumerated in Indiana Code Section 31-19-9-8(a), which provides in relevant part:

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

\* \* \* \* \*

(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 . . . .

\* \* \* \* \*

(11) A parent if:

(A) a petitioner for adoption proves by clear and convincing evidence that the parent is unfit to be a parent; and

(B) the best interests of the child sought to be adopted would be served if the court dispensed with the parent's consent.

\* \* \* \* \*

[15] Our courts have long held that a natural parent enjoys special protection in adoption proceedings. *C.W.*, 202 N.E.3d at 495 (citing *I.B.*, 163 N.E.3d at 274). Accordingly, we strictly construe our adoption statutes to preserve the fundamentally important parent-child relationship. *Id.*

[16] On appeal, Father argues that he was unable to communicate with Child due to his incarceration and that, in determining Father to be unfit, the trial court improperly considered his arrests, not convictions. We need not address Father's communication with Child, however, because the trial court's finding that Father is unfit is not clearly erroneous.

[17] Under Indiana Code Section 31-19-9-8(a)(11), Father's consent to the adoption is not required if Stepfather proved by clear and convincing evidence that Father is "unfit to be a parent" and that the best interests of Child "would be served if the court dispensed with [Father's] consent." On appeal, Father challenges only the trial court's finding that he is unfit; Father does not challenge the trial court's finding regarding Child's best interests. Accordingly, we will address only the trial court's finding that Father is unfit.



[18] The term “unfit” as used in Indiana Code Section 31-19-9-8(a)(11) is not statutorily defined, but “this Court has defined ‘unfit’ as ‘[u]nsuitable; not adapted or qualified for a particular use or service’ or ‘[m]orally unqualified; incompetent.’” *K.H. v. M.M.*, 151 N.E.3d 1259, 1267 (Ind. Ct. App. 2020) (quoting *In re Adoption of M.L.*, 973 N.E.2d 1216, 1223 (Ind. Ct. App. 2012)), *trans. denied*.

We have also noted that statutes concerning the termination of parental rights and adoption “strike a similar balance between the parent’s rights and the child’s best interests” and thus termination cases provide useful guidance in determining whether a parent is unfit. Termination cases have considered factors such as a parent’s substance abuse, mental health, willingness to follow recommended treatment, lack of insight, instability in housing and employment, and ability to care for a child’s special needs. Also, this Court has consistently held in the termination context that it need not wait until children are irreversibly harmed such that their physical, mental, and social development are permanently impaired before terminating the parent-child relationship. It is well-settled that individuals who pursue criminal activity run the risk of being denied the opportunity to develop positive and meaningful relationships with their children.

*Id.* at 1267-68 (internal citations omitted). “A parent’s criminal history is relevant to whether the parent is unfit” under Indiana Code Section 31-19-9-8(a)(11). *Id.* at 1268.

[19] In finding Father unfit, the trial court noted that: (1) Father is incarcerated with an earliest possible release date in 2030; (2) Father has a “lengthy criminal history”; (3) Father has a “lengthy history with the Department of Child

Services” and his other children have been adopted; (4) Father has made little if any effort to communicate with or support Child; and (5) Father’s behavior while incarcerated has limited his ability to communicate with Child.

Appellant’s App. Vol. II pp. 38-39.

[20] Father argues only that his criminal history considered by the trial court was “merely a list of arrests.” Appellant’s Br. p. 11. During the hearing, Petitioner’s Exhibit 5 was admitted, which lists juvenile and adult criminal cases involving Father. Father is correct that this exhibit does not list the resolution of each case. During the hearing, however, Father admitted that he had “a lengthy criminal history”; that his juvenile history began in 2001; and that he pleaded guilty to burglary in one of the cases. Tr. Vol. II p. 52. Father also admitted that he had multiple pending state court charges. Accordingly, the trial court’s finding that Father has a lengthy criminal history is not clearly erroneous.

[21] Given Father’s criminal history, current lengthy incarceration, DCS history, and history of misconduct while incarcerated, we cannot say the trial court’s finding that Father is unfit to parent Child is clearly erroneous. *See, e.g., In re Adoption of H.N.P.G.*, 878 N.E.2d 900, 907 (Ind. Ct. App. 2008) (holding that the father was unfit because he would be incarcerated until the child was thirteen years old, he had a substantial history of illegal drug usage, and he had never met or communicated with the child), *trans. denied*.

## **Conclusion**

[22] The trial court's finding that Father's consent to the adoption is not required is not clearly erroneous. Accordingly, we affirm.

[23] Affirmed.

Pyle, J., and Foley, J., concur.