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**IN THE  
COURT OF APPEALS OF INDIANA**

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J.M., )  
 )  
Appellant, )  
 )  
vs. ) No. 41A01-1008-AD-402  
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ADOPTION OF O.M., )  
 )  
Appellee. )

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APPEAL FROM THE JOHNSON SUPERIOR COURT  
The Honorable Kevin M. Barton, Judge  
Cause No. 41D01-1003-AD-6

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**April 5, 2011**

**MEMORANDUM DECISION - NOT FOR PUBLICATION**

**DARDEN, Judge**

## STATEMENT OF THE CASE

J.M. (“Father”) appeals the adoption of his child, O.M., by O.M.’s stepfather, Q.D. (“Stepfather”).

We affirm.

### ISSUE

Whether the trial court erred by granting Stepfather’s petition to adopt O.M.

### FACTS

O.M. was born on April 12, 2002, to S.T. (“Mother”). Approximately one week later, Father was incarcerated and remained so until October of 2002. Several periods of incarceration followed: April of 2003 to April of 2005; December of 2005 to February of 2007; November of 2007 to February of 2008; and December of 2008 until October of 2010.<sup>1</sup>

On May 26, 2004, while Father was incarcerated, the Johnson County juvenile court entered an order, establishing Father’s paternity; granting Mother custody of O.M.; granting Father supervised visitation; finding Father to be in arrears in the amount of \$2,280.00; and ordering Father to pay child support in the amount of \$57.00 per week through the Johnson County Child Support Clerk.

From June 28, 2005, through September 7, 2005, Father paid a total of \$534.13 in child support through wage garnishments; and, has made no other child support payments since. On April 11, 2008, the Johnson County Title IV-D Prosecutor’s Office filed a

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<sup>1</sup> We note that as of July 8, 2010, Father’s expected release date was October 3, 2010.

petition for contempt citation, alleging Father to be in arrears in the amount \$13,259.87 as of April 4, 2008.

Mother and Stepfather, who began cohabitating in 2005, married in March of 2009. On February 26, 2010, Stepfather filed a petition to adopt O.M. On April 29, 2010, Father filed an opposition to the petition. On July 7, 2010, Stepfather amended the petition to request that O.M.'s last name be changed to that of Stepfather's.

The trial court commenced a two-day hearing on Stepfather's petition on July 7, 2010. Mother testified that she lived at her parents' Franklin home at the time of O.M.'s birth, and Father visited her there prior to his incarceration.

Mother also testified that on April 10, 2005, she took O.M. to visit Father at O.M.'s paternal grandmother's house. Father then had two visits with O.M. over the next two months. Mother denied that Father attempted to schedule additional visits prior to his incarceration in December of 2005.

Although Mother continued to reside in Franklin, she moved residences several times over the ensuing years. Mother testified that she provided a forwarding address with the postal service each time. According to Mother, she had lived at her current residence since August of 2008.

Mother further testified that Father never sent letters, cards or gifts to O.M. Father, however, testified that he sent letters to Mother at her parents' address upon his initial incarceration, but the letters went "unanswered." (Tr. 27). Father could not recall how many letters he sent but believed he sent "three or four," (tr. 61); however, he

testified that he stopped sending letters “two months afterwards” because “[Mother] just wasn’t writing back or [he] was putting the wrong address on there.” (Tr. 28).

Father acknowledged that he received letters and photographs from Mother “on two occasions” in 2004. (Tr. 28). Father then sent letters to Mother “regarding [O.M.]” (Tr. 29). Father testified that he “probably wrote another three letters” that year. (Tr. 29). He further testified that he had his mother send O.M. a birthday card in 2004.

Father testified that from April of 2005 to December of 2005, he telephoned O.M. “three to four times a week.” (Tr. 31). He, however, did not try to telephone Mother or O.M. while incarcerated because he was “positive [Mother] wouldn’t accept collect calls.” (Tr. 44). He also did not send letters because he “got the assumption that [Mother] was severing all ties from [him] . . . .” (Tr. 68).

Father testified that he had had no contact with either Mother or O.M. during 2010. According to Father he wrote to Mother in November or December of 2009 at her current address but “got a ‘returned to sender’ letter . . . .” (Tr. 46).

O.M.’s paternal grandmother testified she visited O.M. several times in 2005 and had Mother’s telephone number in 2005 but lost it. She further testified that Mother telephoned her in 2008 and indicated that she would not allow O.M. to visit her. The grandmother further testified that she and Mother corresponded in January of 2010.

On July 20, 2010, the trial court entered its order, finding, in relevant part, that Stepfather had established by clear and cogent evidence that Father “did fail without justifiable cause to communicate significantly with [O.M.] when able to do so for a

period of at least one (1) year . . . .” (App. 10). Accordingly, the trial court found that Father’s consent to the adoption was not required and granted Stepfather’s petition to adopt O.M.

### DECISION

Father asserts that the trial court erred in finding that his consent was not required for Stepfather’s adoption of O.M.

When we review a probate court’s ruling in an adoption proceeding, we will not disturb that ruling unless the evidence leads to but one conclusion and the trial court reached an opposite conclusion. “We will not reweigh the evidence but instead will examine the evidence most favorable to the [probate] court’s decision together with reasonable inferences drawn therefrom to determine whether sufficient evidence exists to sustain the decision.” The [probate] court’s decision is presumed to be correct, and it is the appellant’s burden to overcome that presumption.

*In re Adoption of H.N.P.G.*, 878 N.E.2d 900, 903 (Ind. Ct. App. 2008) (internal citations omitted), *trans. denied*.

Indiana Code section 31-19-9-8(a)(1)(2)(A) provides that consent to adoption is not required from the parent of a child in the custody of another person if, for a period of at least one year, the parent “fails without justifiable cause to communicate significantly with the child when able to do so[.]” The party seeking to adopt must prove by “clear and convincing evidence” that consent is not required under Indiana Code section 31-19-9-8. *See In re Adoption of M.A.S.*, 815 N.E.2d 216, 220 (Ind. Ct. App. 2004).<sup>2</sup>

[A] party petitioning to adopt without parental consent has the burden of proving both a lack of communication for the statutory period

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<sup>2</sup> Contrary to Father’s assertion, Stepfather was not required to prove “by clear, cogent, and indubitable evidence” that consent was not required. *See* Father’s Br. at 13 (citation omitted).

and that the ability to communicate during that time period existed. Whether this burden has been met is necessarily dependent upon the facts and circumstances of each particular case, including, for example, the custodial parent's willingness to permit visitation as well as the natural parent's financial and physical means to accomplish his obligations. Efforts of a custodial parent to hamper or thwart communication between parent and child are relevant in determining the ability to communicate. However, in order to preserve the consent requirement for adoption, the level of communication with the child must be significant, and also must be more than "token efforts" on the part of the parent to communicate with the child. 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.

*In re Adoption of C.E.N.*, 847 N.E.2d 267, 271-72 (Ind. Ct. App. 2006) (internal citations omitted).

The record shows that O.M. has been in Mother's care and custody since his birth on April 12, 2002. Father last visited O.M. in June of 2005 and last telephoned him in December of 2005, prior to his incarceration. Over the next four years, at least nineteen months of which he was not incarcerated, Father made no attempt to pay child support, write, telephone, or visit O.M.<sup>3</sup> Father admittedly only "assum[ed]" that Mother would not accept letters or telephone calls from him during this time. (Tr. 68).

Stepfather has shown by clear and convincing evidence that Father failed to significantly communicate with O.M. without justifiable cause for a period of at least one year. Moreover, Father's attempt to contact Mother in 2009 does not vitiate the lack of significant communication. *See In re Adoption of J.P.*, 713 N.E.2d 873, 876 (Ind. Ct.

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<sup>3</sup> We note that even in 2004, Father did not write to O.M. Rather, he wrote to Mother "regarding" O.M. (Tr. 29).

App. 1999) (stating that the one-year period need not immediately precede the filing of the petition). Father's argument otherwise is an attempt to reweigh the evidence, which we will not do. We therefore find that the trial court properly allowed Stepfather's adoption of O.M. without Father's consent.

Affirmed.

RILEY, J., and BARNES, J., concur.