

Children's Law Center of Indiana



Adoption

3/23/18

In **E.B.F. v. D.F.**, 93 N.E.3d 759 (Ind. 2018), the Court held that Mother failed to have significant communication with the child for a one year period; however, Mother also had justifiable cause for her failure to communicate during this period as Father and Stepmother thwarted Mother's attempts to communicate with the child. Consequently, the Indiana Supreme Court determined that Mother's consent to the child's adoption by Stepmother was required, and reversed the trial court's decision granting the adoption.

Mother and Father had a child out of wedlock. After Father perpetrated domestic violence against Mother they separated. Mother had primary physical custody of the child, and Father exercised regular and consistent parenting time pursuant to the Indiana Parenting Time Guidelines. Father married Stepmother and initially, there was domestic violence between Father and Stepmother. However, over several years, Father improved and changed his behavior. During the same time period, Mother's living situation became unstable, she entered another relationship marked by domestic violence, and she began to struggle with substance abuse. The child began staying frequently with Father in order to minimize the child's exposure to Mother's circumstances. Mother and Father filed an Agreed Entry with the trial court giving Father primary physical custody, Mother and Father joint legal custody, and Mother parenting time "at such times and upon such conditions as the parties are able to mutually agree." After Christmas 2013, Mother had almost no contact with the child, other than occasionally running into the child around town. Mother dedicated almost all of 2014 to recovering from her substance abuse addiction. Mother was able to leave her abusive relationship, obtain stable housing and employment, and successfully addressed her substance abuse. The child also improved while in Father's care. In January 2015, Stepmother filed a petition for adoption, and Mother objected to the adoption. The trial court ultimately granted the adoption, finding Mother's consent was not necessary because Stepmother had proven by "clear, cogent, and indubitable evidence" that Mother had failed to significantly communicate with the child for at least one year, from December 2013 to January 2015. The trial court then found that the adoption was in the child's best interests. Mother appealed, and the Court of Appeals, in Adoption of E.B.F. v. D.F., 79 N.E.3d 394 (Ind. Ct. App. 2017), affirmed the trial court's decision. The Indiana Supreme Court granted transfer, thereby vacating the Court of Appeal's opinion.

The trial court did not err in determining that Mother failed to significantly communicate with the child for a period of one year. E.B.F. v. D.F., 93 N.E.3d at 763. Parental consent to an adoption can be dispensed with under certain circumstances, which are set forth in part at IC 31-19-9-8. A parent of a child who is in the custody of another person, who fails, without justifiable cause, to communicate with the child when able to do so may have the necessity of their consent to adoption dispensed with, as is provided by IC 31-19-9-8(a)(2). Id. What counts as significant communication is not a precise determination and is not measured in number or length of visits.

Id. Generally, a single communication in a one year time frame is not enough to preserve a non-custodial parent's right to consent to the adoption; however, it is also possible for multiple and relatively frequent contacts to be determined to be not significant. Id. Mother's "few, fleeting, and sometimes unintended" contact with the child were correctly determined to be not significant contacts for the purposes of IC 31-19-9-8-(a)(2). Id.

The totality of circumstance, such as the initial reasons for modification of custody, Mother's battle with addiction, and her good faith effort at recovery constituted justifiable cause for Mother's failure to communicate with the child for a period of one year. Id. at 764. What precisely constitutes justifiable cause is not an issue that has been extensively addressed by case law; although the Court had this question presented to it in In Re Adoption of O.R., 16 N.E.3d 965 (Ind. 2014), it ended up determining that Father's claim of unfamiliarity with the judicial system was not credible. E.B.F. at 764. The Court noted several appellate opinions which also partially addressed what constituted justifiable cause, and opined that the present case allowed for an opportunity to "do the right thing as this particular mother and child, while also providing our trial courts additional instruction on justifiable cause." Id. at 764. The Court highlighted the following facts which led to the conclusion that Mother's failure to communicate was with justifiable cause: (1) Mother relinquished custody willingly, in good faith, and without counsel; (2) Mother maintained primary physical custody for many years until she recognized the harm her personal problems were inflicting upon the child; (3) Mother wanted the new custody arrangement to be temporary until she got her life back in order, and then she intended to seek equal time with the child again; (4) Mother made good faith and successful efforts at recovery while the child was in Father's custody; (5) Mother also ended her abusive relationship, found stable employment, and found suitable living arrangements; (6) Mother accomplished these strides all within the one year while child was in Father's custody; (7) returning to the child's life too early in her recovery could have destabilized both her and the child's progress. Id. at 764-5. Based on these facts, the Court determined that Mother had justifiable cause for not communicating with the child during the one year time frame. Id. at 765.

Although Mother did fail to communicate with the child for a period of one year, Father and Stepmother thwarted Mother's occasional attempts to communicate with the child. Id. at 766. A custodial parent's efforts to thwart communication between the child and the noncustodial parent are relevant when a trial court is determining whether the noncustodial parent had the ability to communicate with the child, and whether their consent is needed. Id. Custodial or prospective adoptive parents do not have an obligation to arrange or facilitate such communications; however, in this case, Father agreed to allow Mother parenting time at times and under conditions to which both parties could agree. Id. The Court determined that this agreement as to parenting time meant that Father had to put forth a good faith effort to arrangement communications between Mother and the child. Id. Neither Stepmother nor Father made any good faith efforts to arrange communication between the child and Mother. Id. Instead of helping, they prevented communication between Mother and the child on the few times where Mother asked for communication with the child. Id. The Court noted evidence such as ignored phone calls from Mother requesting contact, and attempts to communicate in person when Mother encountered Father, Stepmother, or the child in the community. Id. The Court opined that these attempts put Father on notice that Mother wished to see the child, and that Father knew of his obligation to assist in arranging contact between the child and Mother. Id. Stepmother's

argument that they did not thwart communication between Mother and the child because it was the child who did not wish to communicate with Mother was not persuasive; the Court stated that by “acquiescing to Child’s whims to not communicate, the custodial parents serve as the vehicle to thwart communication. A child is not in a position of authority to make that decision on his own...if the noncustodial parent makes a significant attempt to communicate with Child, a custodial parent must take reasonable steps to facilitate that communication, regardless of a Child’s desires.” Id. The Court noted that requiring this was a way to guard against the risk that a custodial parent will try to influence a child to reject the noncustodial parent’s communications. Id. Accordingly, the Court found that Stepmother and Father impeded Mother’s ability and attempts to communicate with the child. Id. at 767.

The Court opined that its decision was not altering the statute’s intended design, which is to limit an absent parent’s ability to halt a potential adoption and its end goal of a stable home and life. Id. at 767. The Court noted that the facts of this case did not present a mother who purposefully abandoned her child, but rather, one who temporarily and willingly gave up custody so that she could regain control of her life, which she did. Id. The Court believed Mother made these decisions with the child’s best interests in mind, and that the child had indeed greatly benefited from the child’s new life with Father and Stepmother. Id. The Court stated that its decision merely preserved Mother’s opportunity to reestablish a relationship with the child, which the Court believed to be in the child’s best interests, as well as Mother’s best interests. Id.