[Cite as *In re Adoption of L.C.H.*, 2010-Ohio-643.]

IN THE COURT OF APPEALS OF OHIO
FOURTH APPELLATE DISTRICT
SCIOTO COUNTY

In re Adoption of:	:	
	:	
L.C.H. and K.S.C.	:	Case Nos. 09CA3318,
	:	09CA3319 & 09CA3324
	:	
	:	**DECISION AND**
	:	**JUDGMENT ENTRY**
	:	File-stamped date: 2-19-10

APPEARANCES:

Ryan D. Kuhn, Kuhn Unlimited, Columbus, Ohio, for Appellant M.C.

Lora H. Cleary, Gahanna, Ohio, for Appellant P.K.

George L. Davis, IV, and George L. Davis, III, George L. Davis, III Co., L.L.C., Portsmouth, Ohio, for Appellee W.B.

Lynn Grimshaw, Wheelersburg, Ohio, for Appellees J.H. and S.B.H.

Kline J.:

{¶1} M.C., the mother of the two children at issue in this case, and P.K., the biological father of the younger child, separately appeal the probate court's judgment, which provided that two separate petitions for adoption could proceed without M.C.'s and P.K.'s consent.

{¶2} In one case below, M.C.'s mother-in-law has petitioned to adopt M.C.'s older child (hereinafter "Child I"). In a second case below, M.C.'s sister-in-law and the sister-in-law's husband have, together, petitioned to adopt the younger child (hereinafter "Child II"). Three appeals arise from the probate court's consolidated judgment of the two cases. That is, (1) M.C. appeals the trial court's non-consent finding involving Child

I; (2) M.C. appeals the trial court's non-consent finding involving Child II; and (3) P.K. appeals the trial court's non-consent finding involving Child II.

{¶3} On appeal, M.C. contends that the trial court erred in finding that M.C. had a common-law duty to support her children even though the Scioto County Child Support Enforcement Agency issued a zero dollar ($0.00) support order. Because the support order lists M.C.'s husband as the obligee even though M.C.'s husband did not have custody of the children, and because M.C. had a change of circumstances during the relevant time period, we disagree. Next, M.C. contends that the trial court erred in finding that she failed to provide maintenance and support for her children during the one year prior to the filing of the petitions. Because the record contains undisputed evidence that M.C. provided non-monetary support for her children during frequent, regularly scheduled visitations, we agree. Based on our resolution of this issue, we find the remaining issues raised by M.C. and P.K. either moot or not yet ripe for review. Accordingly, we reverse the judgment of the trial court.

I.

{¶4} Because these cases are interrelated, we have consolidated these three appeals. In total, this case involves the potential adoptions of two sisters by two different parties. Furthermore, because this case features a very complex factual and procedural history, we will discuss only the facts pertinent to our resolution of this appeal.

A. The Parties

{¶5} First, we will outline the relationships of the individuals in this case. M.C. is the mother of Child I and Child II (collectively the "Children").

{¶6} M.C. and T.C. are husband and wife, and T.C. is the adoptive father of Child I. M.C. and T.C. were married when M.C. gave birth to Child II. However, it was later determined that P.K. is Child II's biological father.

{¶7} W.B. is T.C.'s mother (also M.C.'s mother-in law). W.B. is married to H.B., and both W.B. and H.B. have emergency custody of Child I.

{¶8} J.H. is T.C.'s sister (also M.C.'s sister-in-law). J.H. is married to S.B.H., and both J.H. and S.B.H. have emergency custody of Child II.

{¶9} W.B. (but not H.B.) has petitioned to adopt Child I. Both J.H. and S.B.H. have petitioned to adopt Child II.

{¶10} M.C. gave birth to a third child in 2006. Although M.C. was married to T.C. at the time, T.C. is not the biological father of this child, either. These appeals do not involve the custody or adoption of the third child.

B. History

{¶11} M.C. gave birth to Child I in 2001. M.C. married T.C. in 2003. T.C. is not the biological father of Child I, but T.C. adopted Child I in 2004.

{¶12} Both M.C. and T.C. have had issues with drug addiction. M.C. was addicted to crack cocaine and has been incarcerated several times. M.C.'s criminal history is not entirely clear, but she has three felony convictions and was in-and-out of prison between 2003 and 2006. M.C. first abandoned T.C. and Child I sometime in 2003. As a result, W.B. and H.B. obtained emergency custody of Child I later that year. Child I has remained in the custody of W.B. and H.B. throughout the proceedings below.

{¶13} M.C. gave birth to Child II in 2004. During another one of M.C.'s absences, J.H. and S.B.H. obtained emergency custody of Child II. Child II has remained in the custody of J.H. and S.B.H. throughout the proceedings below.

{¶14} M.C. was released from prison in September 2006. From September 2006 until December 2006, she attended an in-house rehabilitation program.

{¶15} In late December 2006, M.C. interviewed for a job at an insurance agency. She got the job in either December 2006 or January 2007. On January 7, 2007, the Scioto County Child Support Enforcement Agency (hereinafter the "Enforcement Agency") issued a support order regarding the Children. The order listed M.C. as the obligor and T.C. as the obligee. Further, the order provides that M.C. shall pay zero dollars ($0.00) in child support to T.C.

{¶16} On February 1, 2007, M.C. started working full time at the insurance agency, where she earned approximately $1,000.00 per month. In addition to her employment income, M.C. received various government benefits.

{¶17} M.C. rented a three-bedroom apartment in early 2007, and she lived in this particular apartment until February 2008. While testifying, M.C. claimed that she would have rented a smaller apartment, but, instead, rented a three-bedroom apartment because she hoped that the Children would eventually move in. M.C. also testified that she furnished the apartment with various items for the Children.

{¶18} M.C. remained married to T.C. in 2007, but M.C. did not live with T.C. M.C. lived in her own apartment, and T.C. lived with J.H. and S.B.H. Both W.B. and H.B. continued to have custody of Child I, and J.H. and S.B.H. continued to have custody of Child II. Nevertheless, at some point, both children started living with J.H. and S.B.H.

on a permanent basis. After moving in with J.H. and S.B.H., the Children stayed with W.B. and H.B. every other weekend. This living arrangement continued throughout the proceedings below.

{¶19} After being released from the rehabilitation facility, M.C. started visiting with her Children. Initially, M.C. started visiting the Children at the home of J.H. and S.B.H. But in January 2007, the Children started visiting M.C. in M.C.'s own apartment. The weekly (or somewhat weekly) visits in M.C.'s apartment occurred on Sundays. During these visits, T.C. accompanied the Children. M.C. claimed that she cooked for the Children during these visits, and T.C. acknowledged that M.C. did, indeed, sometimes cook for the Children. These visits continued until a disagreement occurred between M.C. and J.H. in June 2007. After the disagreement, J.H. prevented M.C. from seeing the Children.

{¶20} At some point during the summer of 2007, M.C. received a settlement check as the result of an automobile accident. She spent some of the settlement money on the Children during a shopping trip that same summer. M.C., T.C., and the Children went to a mall together, and M.C. purchased several outfits and a pair of shoes for each child.

{¶21} Sometime after the disagreement between M.C. and J.H., M.C. filed for divorce from T.C. During the divorce proceedings, the paternity of Child II became an issue. Eventually, it was determined that P.K. is Child II's biological father.

{¶22} In August 2007, M.C. petitioned the Juvenile Court for parenting time with the Children. The petition for Child I states the following: "The undersigned respectfully requests that this Court modify its Order of Parenting Time/Visitation for the reason that

there is no established set visitation on my behalf." Later that year, the Juvenile Court awarded M.C. parenting time with the Children. M.C. visited with the Children that Christmas and brought the Children some Christmas presents.

{¶23} Court-ordered, supervised visitations began in February 2008. W.B. supervised these visits, which lasted for two-hours and occurred on a bi-weekly basis. During these visits, M.C. regularly brought pizza, activities, and crafts for the Children. These visits have apparently continued throughout the proceedings below. At a minimum, these visits continued through May 2008.

{¶24} In February 2008, M.C. was fired from her job at the insurance agency. M.C. continued to receive welfare, food stamps, and various other government benefits.

{¶25} In May 2008, W.B. (but not H.B.) petitioned to adopt Child I, and J.H. and S.B.H. petitioned to adopt Child II. The petitions alleged that M.C.'s consent was not required because she had failed to provide for the maintenance and support of the Children. R.C. 3107.07(A) provides: "Consent to adoption is not required of * * * [a] parent of a minor, when it is alleged in the adoption petition and the court, after proper service of notice and hearing, finds by clear and convincing evidence that the parent has failed without justifiable cause to provide more than de minimis contact with the minor or to provide for the maintenance and support of the minor as required by law or judicial decree for a period of at least one year immediately preceding either the filing of the adoption petition or the placement of the minor in the home of the petitioner." Thus, pursuant to R.C. 3107.07(A), the trial court found that the relevant time period in this case is May 2007 through May 2008. Further, it is *undisputed* that M.C. did not give

any money to W.B., H.B., J.H., or S.B.H. for the maintenance and support of the Children during this time period.

{¶26} T.C. consented to both adoptions, but M.C. did not. It was later determined that P.K. is Child II's biological father. As a result, the issue of T.C.'s consent as to the adoption of Child II became irrelevant. And in December 2008, the trial court dismissed T.C. as a party in the matters concerning Child II. However, in that same order, the court did not explicitly make P.K. a party to the same proceedings involving Child II.

{¶27} In its December 5, 2008 entry, the trial court stated the following: "With respect to the adoption cases, the Court will hold a bifurcated hearing to first deal with the issue of the necessity of parental consent, and then the best interests of the children and the granting of the adoption." The consent hearing took place on April 13 and 14, 2009, and the trial court's subsequent decisions dealt only with the necessity of parental consent. Therefore, the trial court has not yet addressed the best interests of the Children. Similarly, our decision does not address the best interests of the Children, and we offer no opinion as to the best-interests issue.

{¶28} The April 2009 hearing addressed only whether M.C.'s consent was required; that is, whether M.C. failed without justifiable cause to provide for the maintenance and support of the Children. At the hearing, the trial court did *not* consider the issue of P.K.'s consent as to Child II. Nevertheless, P.K. attended the April 2009 hearing, but only as an observer. In fact, P.K. did not participate at all in the proceedings below. This appeal represents P.K.'s first formal appearance in this matter.

{¶29} M.C., W.B., H.B., and J.H. all testified at the April 2009 hearing. S.B.H. did not testify at the hearing, but he did submit to a deposition earlier that month. At the

hearing, M.C. claimed that she purchased numerous items for the Children. To support this claim, M.C. introduced several receipts into evidence. Additionally, the manager of a K-Mart store testified about purchases that M.C. may have made at that store, and two of M.C.'s relatives testified about purchases that M.C. may have made for the Children during a trip to Tennessee in August 2007.

{¶30} On April 22, 2009, J.H. and S.B.H. filed a "MOTION TO FIND CONSENT UNNECESSARY REGARDING [P.K.]." J.H. and S.B.H. based this motion, in part, on (1) P.K.'s failure to register with the putative father registry and (2) P.K.'s failure to object to the adoption proceedings. P.K. did not respond to this motion.

{¶31} On September 11, 2009, the trial court issued a "FINDING OF THE COURT AND ENTRY." This entry states that "[b]ased on all the testimony adduced at trial, the Court finds that [M.C.] failed to support her children without justifiable cause, and therefore her consent is not necessary. * * * The items purchased by the mother here either were held by her for the children's use when they visited her home, or were gifts whose value as support was de [minimis]. Gifts at Christmas and some clothes and shoes when school starts are not sufficient to meet a parent's obligation to support her child. * * * For the reasons above, the Court finds by clear and convincing evidence that [M.C.] failed, without justifiable cause, to provide support within the applicable one-year period. Her consent to these adoptions, therefore, is not necessary."

{¶32} Regarding the issue of P.K.'s consent, the trial court found that "[t]here was no testimony as to what support, if any, which was paid by [P.K.] at any time, before or after the filing of the petition to adopt by anyone who testified. [P.K.], himself, did not testify; nor did he offer any testimony from witnesses on his behalf. Accordingly, the

Court makes no findings as to the necessity of his consent at this time, but will consider that issue at a later date, if necessary."

{¶33} Based on the foregoing, the trial court held that "[t]he adoptions shall proceed and may be set for such further hearings as are necessary, as soon as is practicable." Both M.C. and P.K. filed timely appeals from the trial court's September 11, 2009 entry. Despite the trial court's subsequent entry, this opinion addresses only (1) the September 11, 2009 entry and (2) the issue of M.C.'s consent, which is dispositive.

{¶34} On October 28, 2009, the trial court apparently informed the attorneys for both M.C. and J.H and S.B.H. that the trial court intended to review and reconsider the September 11, 2009 entry. There is no indication that the trial court informed P.K. of this intention.

{¶35} In an October 30, 2009 entry, the trial court found that the September 11, 2009 entry "failed to adequately deal with the issue of the necessity of the consent of the non-consenting natural father of [Child II.]" After reconsidering the issue, the trial court found that the adoption of Child II does not require P.K.'s consent. The trial court based this finding on P.K.'s failure to object to the adoption pursuant to R.C. 3107.07(K). As a result, the trial court once again found that the adoption of Child II could proceed.

{¶36} M.C. appeals the trial court's September 11, 2009 judgment and asserts the following eight assignments of error: I. "THE TRIAL COURT ERRED IN EXERCISING JURISDICTION OVER THE PETITION FOR ADOPTION AS THE ISSUE OF PATERNITY HAD BEEN RAISED AND WAS CURRENTLY BEING LITIGATED IN THE DOMESTIC RELATIONS DIVISION OF THE SCIOTO COUNTY COURT OF COMMON

PLEAS." II. "THE TRIAL COURT ERRED IN PERMITTING [W.B.] TO ADOPT WITHOUT HER SPOUSE JOINING AS A PETITIONER." III. "THE TRIAL COURT ERRED IN PERMITTING [W.B.] TO ADOPT A CHILD WHOM SHE DOES NOT INTEND TO RAISE." IV. "THE TRIAL COURT ERRED IN FINDING THAT [M.C.] POSSESSED A COMMON-LAW DUTY TO PROVIDE MAINTENANCE AND SUPPORT FOR HER CHILDREN." V. "THE TRIAL COURT'S FINDING THAT [M.C.] FAILED TO SUPPORT HER CHILDREN FOR THE REQUISITE ONE-YEAR TIME PERIOD IS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE AND AMOUNTS TO AN ABUSE OF DISCRETION." VI. "THE TRIAL COURT'S FINDING THAT [M.C.]'S FAILURE TO PROVIDE SUPPORT WAS WITHOUT JUSTIFIABLE CAUSE IS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE AND AMOUNTS TO AN ABUSE OF DISCRETION." VII. "THE TRIAL COURT'S FINDING THAT [P.K.] FAILED TO SUPPORT HIS CHILD FOR THE REQUISITE ONE-YEAR TIME PERIOD IS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE AND AMOUNTS TO AN ABUSE OF DISCRETION." And, VIII. "THE TRIAL COURT ERRED IN PERMITTING [J.H.] TO PROCEED WITH THE ADOPTION WITHOUT FIRST PETITIONING THE PROBATE COURT FOR ADOPTIVE PLACEMENTS PURSUANT R.C. 5103.16(D) [sic]."

{¶37} P.K. also appeals the trial court's September 11, 2009 judgment and asserts the following two assignments of error: I. "THE TRIAL COURT ERRED AND ABUSED ITS DISCRETION BY FINDING IN ITS ORDER DATED SEPTEMBER 11, 2009, THAT THE ADOPTIONS WOULD PROCEED WITHOUT MAKING ANY FINDING OF FACT OR CONCLUSION OF LAW AS TO WHETHER THE CONSENT OF THE BIOLOGICAL

FATHER WAS NECESSARY." And, II. "THE TRIAL COURT ERRED AND ABUSED ITS DISCRETION BY ENTERING AN ORDER ON ITS OWN MOTION ATTEMPTING TO CORRECT THE ERRORS IN ITS SEPTEMBER 11, 2009 ENTRY AND DISPOSING OF A MOTION BY PETITIONERS ON OCTOBER 30, 2009 WITHOUT NOTICE TO THE BIOLOGICAL FATHER OR AN OPPORTUNITY FOR A HEARING FINDING THE CONSENT OF THE BIOLOGICAL FATHER WAS UNNECESSARY AND THE ADOPTION OF [CHILD II] COULD PROCEED IN VIOLATION OF THE FATHER'S RIGHT TO DUE PROCESS."

II.

{¶38} In the present case, the trial court found that M.C. failed to provide maintenance and support for her Children during the relevant one year period. Thus, the court concluded that M.C.'s consent to the adoptions was not required.

{¶39} This court recently addressed similar issues in *In re Adoption of S.L.N.*, Scioto App. No. 07CA3189, 2008-Ohio-2996. In that case, we stated, "It is undisputed that parents have a fundamental liberty interest in the care, custody and management of their children. *Troxel v. Granville* (2000), 530 U.S. 57, 65, 120 S.Ct. 2054, 2060, 147 L.Ed.2d 49, 56. The right to raise one's child is an essential and basic civil right in this country. *In re Hays* (1997), 79 Ohio St.3d 46, 48, 679 N.E.2d 680, 682-683. An adoption obviously terminates that right. *In re Adoption of Greer* (1994), 70 Ohio St.3d 293, 298, 638 N.E.2d 999, 1003; see, also, R.C. 3107.15(A)(1). Generally, children cannot be adopted without the consent of their natural parents because consent is a jurisdictional prerequisite to adoption. See *McGinty v. Jewish Children's Bur.* (1989), 46 Ohio St.3d 159, 161, 545 N.E.2d 1272, 1274; see, also, R.C. 3107.06(A).

{¶40} One exception to the general rule is found in R.C. 3107.07(A) * * *. [That is], [t]he party that seeks to adopt a child without parental consent must prove, by clear and convincing evidence, both (1) that the natural parent failed to support or to communicate with the child for the requisite one-year time period, and (2) that the failure was without justifiable cause. *In re Adoption of Bovett* (1987), 33 Ohio St.3d 102, 515 N.E.2d 919, at paragraph one of the syllabus." *S.L.N.* at ¶19-21.

{¶41} We address the present case with these same considerations in mind.

IV.

{¶42} We will first address M.C.'s assignments of error. Further, we will address her fourth and fifth assignments of error out of order because they are related, and M.C.'s fifth assignment of error is dispositive.

{¶43} In her fourth assignment of error, M.C. contends that the trial court erred in finding that M.C. had a common-law duty to provide maintenance and support for her Children. M.C. bases her argument on (1) the Enforcement Agency's order and (2) this court's decision in *In re Adoption of Way*, Washington App. No. 01CA23, 2002-Ohio-117.

{¶44} Whether M.C. had a common-law duty to provide maintenance and support for her Children is a question of law. We review questions of law de novo. See, e.g., *Roll v. Edwards,* Ross App. No. 05CA2833, 2006-Ohio-830, ¶18.

{¶45} The trial court found that M.C. had an obligation to support her Children. In support of this finding, the trial court cited *In re Adoption of J.M.N.*, Clark App. Nos. 08-CA-23 & 08-CA-24, 2008-Ohio-4394. The *J.M.N.* court stated, "[t]he notion that a parent must provide for her child is rooted, most would agree, in something much

deeper than the statutory or common law. Indeed, the Ohio Supreme Court has observed that this duty is at root a 'principle of natural law.' *Smith v. Smith*, 109 Ohio St.3d 285, 287, 847 N.E.2d 414, 2006-Ohio-2419, citing *Pretzinger v. Pretzinger* (1887), 45 Ohio St. 452, 458, 15 N.E. 471. So robust is the duty, the parent need not even have custody of her child for it to attach. *In re Adoption of Kuhlmann* (1994), 99 Ohio App.3d 44, 50, 649 N.E.2d 1279; R.C. 2151.011(B)(10)." *J.M.N.* at ¶14.

{¶46} Here, the Enforcement Agency issued an order that (1) named M.C. as the obligor and (2) ordered M.C. to pay "$.00 per month for current child support effective 01/08/2007." As such, M.C. argues that the zero-dollar child support order supersedes the common-law duty to support her Children.

{¶47} To support her argument, M.C. cites this court's decision in *Way*. In *Way*, we found that "[t]here is no question that parents have a duty to support their children. *See generally Haskins v. Bronzetti* (1992), 64 Ohio St.3d 202, 203, 594 N.E.2d 582, 584; *State ex rel. Wright v. Industrial Commission* (1943), 141 Ohio St. 187, 47 N.E.2d 209, at paragraph one of the syllabus. In divorce cases, however, the Ohio Supreme Court has held that this duty is superseded by the statutory child support provisions. *See Meyer v. Meyer* (1985), 17 Ohio St.3d 222, 224, 478 N.E.2d 806, 808. Thus, custodial parents are not entitled to receive support payments from non-custodial parents on the basis of a general duty of support when no support order was issued at the time of the custody award. *Id.* at the syllabus. [Other Ohio] courts essentially carried this rule into adoption cases and held that when a domestic relations court ordered no support be paid by the non-custodial parent, that order superseded the common law duty of support. Thus, a petitioner seeking to adopt a minor child could not exploit the non-

custodial parent's compliance with that order in order to establish an unjustifiable failure of support under R.C. 3107.07." *Way*.

{¶48} In *Way*, we also noted that "[a]doption cases are all fact specific and turn on the particular facts and circumstances present in each case." Id. Here, we believe that several facts make the present case distinguishable from *Way*. First, the Enforcement Agency's order lists T.C. as the obligee. However, at that time, T.C. did not have custody of either child. W.B. and H.B. obtained custody of Child I in August 2003, and J.H. and S.B.H. obtained custody of Child II in September 2005. The child support order was issued on January 7, 2007 with an effective date of January 8, 2007. In our view, these facts are significant. Pursuant to R.C. 3119.01(B)(3), "'[o]bligee' means the person who is entitled to receive the support payments under a support order." Because T.C. did not have custody of the Children, we do not believe that T.C. was entitled to support payments. In other words, the support order should not have named T.C. as an obligee. Moreover, because T.C. was not the Children's legal custodian, any potential payments to T.C. would have had little-to-no effect on the Children's day-to-day lives. Therefore, we believe that the Enforcement Agency's order is largely irrelevant. Had M.C. obtained a similar order regarding payments to the Children's custodians – the individuals entitled to support payments – perhaps we may have reached a different conclusion.

{¶49} *Way* is further distinguishable because, in the present case, M.C. had a near immediate change in circumstances. In *Way*, the mother's "sole source of income [wa]s her $512 monthly SSI benefit. She ha[d] no job and earn[ed] no other income." *Way*. As a result, "a December 29, 1997 Juvenile Court order relieved [the mother] of her

child support obligation." Id. The petitioner in *Way* filed for adoption on May 16, 2000. Id. Thus, in *Way*, the mother's income remained meager and unchanged for nearly two-and-a-half years.

{¶50} In the present case, however, M.C. experienced a dramatic increase in her income less than one month after the Enforcement Agency issued its support order. After being released from prison, M.C. attended an in-house rehabilitation program until December 2006. The Enforcement Agency issued the support order on January 7, 2007, and M.C. started working at the insurance agency on February 1, 2007. Thus, unlike the mother in *Way*, M.C. had an appreciable and near immediate change in her income. In *Way*, the mother did not have a change in circumstances after the Juvenile Court relieved her of her child support obligation. Here, M.C. did have a change of circumstances, and we do not believe that a parent should be able to rely on an outdated support order to avoid the duty to one's children.

{¶51} For the foregoing reasons, we believe that the present case is distinguishable from *Way*. Similarly, we find that the trial court did not err in finding that M.C. had a duty to support her Children. M.C. cannot rely on the Enforcement Agency's order because (1) T.C. is listed as the obligee and (2) M.C.'s income increased so soon after the Enforcement Agency issued the order. Because of the facts in this case, which are distinguishable from *Way*, we agree that M.C. had a common-law duty to support her Children.

{¶52} Accordingly, we overrule M.C.'s fourth assignment of error.

V.

{¶53} In her fifth assignment of error, M.C. contends that the trial court erred in finding that her consent was not necessary because she failed to provide maintenance and support for her Children from May 2007 through May 2008.

{¶54} We outlined our standard of review in *S.L.N.,* supra. We stated, "[w]e will not disturb a finding that parental consent is unnecessary for an adoption unless it is against the manifest weight of the evidence. [*In re Adoption of Bovett,* supra,] at paragraph four of the syllabus. In other words, if the trial court's finding is supported by some competent credible evidence, that decision will survive appellate review. See *Shemo v. Mayfield Hts.* (2000), 88 Ohio St.3d 7, 10, 722 N.E.2d 1018, 1022. This remains true even where the burden of proof is 'clear and convincing.' See *In re Adoption of Bovett*, supra, at paragraph four of the syllabus.

{¶55} We further acknowledge that the trial court, as trier of fact, is obviously in a better position than the appellate court to view the witnesses and to observe their demeanor, gestures and voice inflections, and to use those observations in weighing the credibility of the proffered testimony. See *Myers v. Garson* (1993), 66 Ohio St.3d 610, 615, 614 N.E.2d 742, 745. Accordingly, we defer to the trial court on issues of weight and credibility. Moreover, a trial court is free to believe all, part or none of the testimony of each witness who appears before it. See *Rogers v. Hill* (1998), 124 Ohio App.3d 468, 470, 706 N.E.2d 438, 439." *S.L.N.* at ¶22-23.

{¶56} "Chapter 3107 of the Ohio Revised Code does not define the terms 'maintenance' or 'support.' Therefore, we must afford these terms their plain and ordinary meanings. * * * 'Maintenance' has been defined as '[f]inancial support given by one person to another.' * * * 'Support' has been defined as '[s]ustenance or

maintenance; esp., articles such as food and clothing that allow one to live in the degree of comfort to which one is accustomed.' * * *.

{¶57} 'Generally speaking, the words 'support' and 'maintenance' are used synonymously to refer to food, clothing and other conveniences, and shelter, including, in some cases, medicines, medical care, * * * education, and reasonable personal care * * *.' * * * Thus, it is clear that the duty of support and maintenance contemplated by R.C. 3107.07 encompasses all of the minor child's economic necessities and transcends contractual or decretal obligations." *In re Adoption of B.M.S.*, Franklin App. No. 07AP-236, 2007-Ohio-5966, at ¶24-25 (internal citations omitted).

{¶58} Even though the terms "maintenance" and "support" are used synonymously, M.C. has divided her fifth assignment of error into separate arguments based on (1) maintenance and (2) support. First, M.C. argues that she provided maintenance for the benefit of her Children. Then, M.C. argues that she provided support for her Children. Because M.C. advances different theories under these arguments, we will address these arguments separately.

A. M.C.'s Maintenance Arguments

{¶59} For the following reasons, M.C. argues that she provided maintenance for the benefit of her Children: (1) that M.C. paid additional rent for a three-bedroom apartment; (2) that M.C. spent money on various legal fees and costs, including attorney fees related to the adoption proceedings; (3) that individuals other than M.C. claimed the dependency income tax exemptions for 2007 and 2008; and (4) that because of her marriage to T.C., M.C. made contributions to the Children from the marital estate. We are not persuaded by any of these arguments.

{¶60} First, the additional rent for a three-bedroom apartment cannot be considered either maintenance or support. M.C. argues that she rented a bigger apartment and, as a result, paid more in rent because she hoped that the Children would eventually move in. However, it is undisputed that the Children never lived with M.C. during the relevant one-year period. Thus, any additional rent paid by M.C. did not actually benefit the Children.

{¶61} Similarly, the Children did not benefit from the fees related to the adoptions and various other legal proceedings. These fees are not comparable to food, clothing, shelter, education, or medical care, and M.C. has presented no authority in support of this particular argument.

{¶62} M.C. also claims that she provided maintenance because other individuals claimed the Children's dependency tax exemptions in 2007 and 2008. However, M.C.'s argument ignores the plain language of R.C. 3107.07(A), which states that a parent must "*provide* for the maintenance and support of the minor[.]" (Emphasis added.) "Provide" means "to supply what is needed for sustenance or support." Webster's Third New International Dictionary, Unabridged (2002). Even after construing R.C. 3107.07(A) in M.C.'s favor, we cannot say that M.C. provided the exemptions to the individuals who claimed the Children. M.C. did not *supply* the dependency tax exemptions; the federal government did. For this reason, M.C.'s argument about the dependency tax exemptions is without merit.

{¶63} Finally, M.C. argues that, pursuant to R.C. 3105.171, "all funds earned or expended by either spouse during [the one year] period are deemed marital. There was a fair amount of testimony about the support that [T.C.] had paid the Petitioners as well

as direct contributions he had made towards child-related expenses such as daycare. As a matter of law, one-half of these contributions are attributable to [M.C.]." Supplemental Brief of Appellant, [M.C.] at 14. This argument is creative, but it has no support in the law. The duty to support minor children is "placed on both parents." *Trump v. Trump* (1999), 136 Ohio App.3d 123, 126, citing *Haskins* at 204. See, also, R.C. 3103.03(A). A married parent may not avoid this duty based on a "marital property" argument like the one M.C. makes here. If a parent could avoid this duty based on such an argument, there would be, in effect, a duty to support placed on married parents as a couple. But such a result conflicts with R.C. 3103.03(A), which states that "[t]he biological or adoptive parent of a minor child must support the parent's minor children." By using the singular form of "parent," R.C. 3103.03(A) imposes a duty to support minor children on married parents as individuals.

{¶64} Accordingly, we reject all of M.C.'s "maintenance" arguments.

B. M.C.'s Support Arguments

{¶65} Before we address M.C.'s support arguments, we again note that M.C. gave *no money* to the Children's custodians during the relevant one-year period. Thus, the crux of M.C.'s argument is that she provided support other than monetary support. Specifically, M.C. claims that she provided support for the Children because she (1) purchased various items for the Children and (2) provided food, games, and toys for the Children during the Children's visits with M.C.

{¶66} First, we will address the items that M.C. claims to have purchased for the Children. This court has held that "maintenance and support may consist of contributions other than monetary payments to the child's custodian[.]" *In re Adoption of*

McNutt (1999), 134 Ohio App.3d 822, 830. Nevertheless, we also recognize that "contributions which are of no value to the child generally do not qualify as maintenance and support." Id. Here, the trial court found that "[g]ifts at Christmas and some clothes and shoes when school starts are not sufficient to meet a parent's obligation to support her child." September 11, 2009 Finding of the Court and Entry at 9. Therefore, we must determine whether this finding is against the manifest weight of the evidence.

{¶67} Here, we believe that some competent credible evidence supports the trial court's finding. M.C. claims that she purchased numerous items for the Children. To support this claim, M.C. offered several receipts into evidence. The trial court found that "[s]he did not have the original receipts from any stores where she claimed she made [t]he purchases. What she offered were copies of printouts from [various stores] taken off computerized records, the quality of which is so poor as to be illegible. Further, there were no identifiable markings on these exhibits that would identify the exhibit as being from any particular place of business. The Court therefore places no probative value on these exhibits. They are not reliable." September 11, 2009 Finding of the Court and Entry at 7. We have reviewed these exhibits, and we agree with the trial court's conclusion.

{¶68} J.H. testified that M.C. gave the Children only the following items: (1) some outfits and shoes from the summer 2007 shopping trip; (2) Christmas gifts; and (3) birthday gifts. This contrasts with M.C.'s testimony, but we defer to the trial court on issues of credibility. Therefore, the trial court was free to find J.H.'s testimony more credible.

{¶69} Further, "when the child possesses sufficient clothes and toys, the [parent's] purchase of clothing and toys may not be sufficient to preserve the [parent's] right to prevent an adoption. * * * Nor will gifts to the child qualify as support." *McNutt* at 830, citing *In re Adoption of Strawser* (1987), 36 Ohio App.3d 232, 234. See, also, *B.M.S.* at ¶33. Here, the record reflects that both Children possessed sufficient clothes and toys. Further, the Children received many of the items from M.C. as gifts. Therefore, we agree that these items do not constitute maintenance and support.

{¶70} Accordingly, some competent credible evidence supports the trial court's finding that "[g]ifts * * * and some clothes and shoes * * * are not sufficient to meet a parent's obligation to support her child."

{¶71} Next, we will address M.C.'s argument that she provided food, games, and toys for the Children during their visits. Numerous Ohio courts "have held that a natural parent who provides for a child's needs during visitation has provided sufficient support to avoid a determination that consent is unnecessary for an adoption." *Garner v. Greenwalt*, Stark App. No. 2007 CA 00296, 2008-Ohio-5963, at ¶28, citing *In re Adoption of Huffman* (Aug. 29, 1986), Mercer App. No. 10-85-4; *McNutt* at 831; *In re Adoption of Pinkava* (Jan. 13, 1989), Lucas App. No. L-88-03; *Gorski v. Myer*, Stark App. No. 2005CA00033, 2005-Ohio-2604, at ¶17.

{¶72} Here, T.C. agreed that M.C. sometimes cooked for the Children when the Children visited M.C.'s apartment. Further, W.B. testified that M.C. brings "one of those five dollar pizzas" to "[p]retty much every" one of the court ordered visitations. Moreover, W.B. also testified that M.C. "brings activities every time." These activities have included blowing bubbles, jumping rope, making photo albums, and other arts-

and-crafts activities. Further, W.B. testified that M.C. has allowed the Children to keep the photo albums and some of the crafts.

{¶73} M.C. cites *McNutt* in support of her argument. In *McNutt*, this court overturned a decision that the father's consent to an adoption was not required. We found that the father "presented undisputed evidence that, during the one-year period in question, he provided [the child] with necessities in the course of exercising his visitation privileges with [the child]." *McNutt* at 831. This was so because the father "visited [the child] every other weekend and provided [the child] with food, clothing, shelter, and diapers during those visits. [The father] also testified that he purchased toys and entertainment for [the child], such as children's movies on videotape." Id. at 827. These facts, in part, provided the basis for our decision in *McNutt*. In the present case, there is undisputed evidence that M.C. provided food, shelter, toys, and entertainment for the Children during their visits together. Thus, we must determine whether the present case is distinguishable from *McNutt* and other similar cases.

{¶74} Other cases have, indeed, found cases like *McNutt* to be distinguishable. For example, in *B.M.S.*, the "appellant exercised visitation on only five weekends, or approximately ten days, during the one year preceding the filing of the petition." *B.M.S.* at ¶28. As a result, the Tenth District Court of Appeals found cases like *McNutt* to be distinguishable because, in those cases, "the non-consenting parent had exercised regular, weekly or bi-weekly visitation in the parent's home, throughout the relevant one-year period[.]" Id. See, also, *McNutt* at 825-26; *Huffman*; *Gorski* at ¶4; *Pinkava*. Similarly, in *Garner,* the Fifth District Court of Appeals found *Gorski* to be distinguishable in a case where the mother "visited with the children five to ten times in

the year preceding the filing of the petition." *Garner* at ¶32-33. In contrast, the father in *Gorski* "saw the child every other weekend and provided the child with food, clothing and toys." Id. at ¶32. See, also, *In re Adoption of A.M.H.*, Montgomery App. No. 23413, 2009-Ohio-4576, at ¶32 ("In [*Huffman* and *Pinkava*,] the non-consenting parents had exercised regular, weekly or bi-weekly visitation in the parent's home throughout the relevant period.").

{¶75} Accordingly, we believe that cases like *McNutt* are distinguishable when the non-consenting parent's visitations are limited and sporadic. Therefore, when a parent provides non-monetary support to a child during frequent, regularly scheduled visitations, that parent has provided maintenance and support as contemplated by R.C. 3107.07(A).

{¶76} With this in mind, we cannot distinguish the present case from *McNutt*. Here, the Children visited M.C.'s apartment during the beginning of the one-year period. During those regular visits, M.C. provided shelter and sometimes cooked for the Children. M.C. did not regularly visit with the Children again until February 2008, but that was because the custodians blocked M.C. from seeing the Children. M.C. went to court to obtain visitation rights. Therefore, even though M.C. did not visit with the Children throughout much of the one-year period, we cannot fault M.C. for this. M.C. did not choose to ignore her Children. Instead, she took the proactive step of going to court. After the court granted M.C. visitation rights, M.C. visited with the Children on a regular, bi-weekly basis. Further, she provided food at "pretty much every" one of the regularly scheduled visitations. M.C. also brought activities to every visit. These visits continued throughout the rest of the one-year period.

{¶77} Accordingly, we find that M.C. provided non-monetary support during her frequent, regularly scheduled visits with the Children. There is undisputed evidence that, during the relevant one-year period, M.C. provided the Children with necessities in the course of exercising her visitation privileges. This finding comports with our decision in *McNutt*, wherein we noted that "a 'meager' amount of support is sufficient to avoid a finding that the parent's consent is not required." *McNutt* at 829 (citations omitted). As such, the petitioners failed to meet their burden; that is, the petitioners did not prove by clear and convincing evidence that M.C. failed to provide for the maintenance and support of her Children.

{¶78} In conclusion, we find that the adoptions require M.C.'s consent because "the record does not contain any competent, credible evidence supporting a finding that [M.C.] failed to provide for [the Children's] maintenance and support during the year preceding the petition[s]." Id.

{¶79} Accordingly, we sustain M.C.'s fifth assignment of error.

VI.

{¶80} Based on our resolution of M.C.'s fifth assignment of error, we find M.C.'s remaining assignments of error moot. We have found that the adoptions require M.C.'s consent. Therefore, we need not address M.C.'s remaining assignments of error. See App.R. 12(A)(1)(c).

{¶81} Similarly, we also find P.K.'s appeal moot. R.C. 3107.06(A), (B), & (C) provide: "Unless consent is not required under section 3107.07 of the Revised Code, a petition to adopt a minor may be granted only if written consent to the adoption has been executed by *all* of the following: (A) The mother of the minor; (B) The father of the

minor, if any of the following apply * * *. (C) The putative father of the minor[.]" (Emphasis added.) Here, we have found that the adoption of Child II requires M.C.'s consent. However, M.C. has objected to the adoption of Child II. Therefore, even if we were to find that P.K.'s consent was not required, the adoption of Child II could not proceed. Accordingly, the issue of P.K.'s consent has become irrelevant and, thus, moot.

{¶82} We understand that, theoretically, M.C. could change her mind and consent to the adoption of Child II. In that case, the issue of P.K.'s consent would not be moot. However, this scenario depends on a future event that may not occur. "Generally, a claim is not ripe if the claim rests upon 'future events that may not occur as anticipated, or may not occur at all.'" *Eagle Fireworks, Inc. v. Ohio Dept. of Commerce*, Washington App. No. 03CA28, 2004-Ohio-509, at ¶9, quoting *Texas v. United States* (1998), 523 U.S. 296, 300. Thus, at a minimum, P.K.'s appeal is not ripe for our review. We take no position on any of the issues raised by P.K.'s appeal, including whether he has standing to appeal or whether the trial court's October 30, 2009 reconsideration of its September 11, 2009 order (only involving P.K.) is a nullity.

VII.

{¶83} In conclusion, we find that M.C. had a common-law duty to support her Children. However, we also find that the record does not contain competent credible evidence to support the trial court's finding that M.C. failed to provide for the Children's maintenance and support during the relevant one-year period. M.C. provided non-monetary support during her frequent, regularly scheduled visits with the Children. Therefore, the Children's adoptions require M.C.'s consent. This finding renders M.C.'s

other assignments of error moot. Similarly, we find P.K.'s appeal to be either moot or, at a minimum, not ripe for our review.

{¶84} Accordingly, we overrule M.C.'s fourth assignment of error, sustain M.C.'s fifth assignment of error, and reverse the judgment of the trial court.

JUDGMENT REVERSED.

Harsha, J., concurring:

{¶85} I reluctantly concur. Perhaps the appellees should consider refiling their petitions based upon the other time period referenced in R.C. 3107.07, i.e. the one-year time frame immediately preceding the placement of the minor in the homes of the petitioners.

JUDGMENT ENTRY

It is ordered that the JUDGMENT BE REVERSED and appellees pay the costs herein taxed.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Scioto County Court of Common Pleas, Probate Division, to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure. Exceptions.

Harsha, J..: Concurs in Judgment and Opinion with Opinion.
Abele, J.: Concurs in Judgment and Opinion.

For the Court

BY: _____
Roger L. Kline, Judge

NOTICE TO COUNSEL

Pursuant to Local Rule No. 14, this document constitutes a final judgment entry and the time period for further appeal commences from the date of filing with the clerk.