[Cite as *In re Adoption of X.A.F.*, 2018-Ohio-215.]

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

IN THE MATTER OF:	:	Case No. 17CA18
THE ADOPTION OF	:	
X.A.F.	:	DECISION AND JUDGMENT ENTRY

APPEARANCES:

Steven L. Story, Pomeroy, Ohio, for Appellant.[1]

CIVIL CASE FROM COMMON PLEAS COURT, PROBATE DIVISION
DATE JOURNALIZED:1-12-18
ABELE, J.

{¶ 1} Latesha Klein, respondent below and appellant herein, appeals the Athens County Common Pleas Court, Probate Division, judgment that determined, pursuant to R.C. 3107.07(A), that her consent to her child's adoption is not required. In particular, the trial court found that, for at least one year immediately preceding the filing of the adoption petition, appellant failed, without justifiable cause, to have more than de minimis contact with her child.

{¶ 2} Appellant raises the following assignments of error for review:

FIRST ASSIGNMENT OF ERROR:

"THE PROBATE COURT ERRED BY FINDING THAT

[1]Appellant did not have the benefit of counsel during the trial court proceedings. Also, appellee did not enter an appearance in this appeal.

APPELLANT'S FAILURE TO HAVE CONTACT WITH THE MINOR CHILD DURING THE LOOK BACK PERIOD WAS WITHOUT JUSTIFIABLE CAUSE."

SECOND ASSIGNMENT OF ERROR:

"THE PROBATE COURT ERRED BY FINDING THAT APPELLANT'S FAILURE TO PAY SUPPORT DURING THE LOOK BACK PERIOD WAS WITHOUT JUSTIFIABLE CAUSE."

THIRD ASSIGNMENT OF ERROR:

"THE PROBATE COURT ERRED IN ISSUING A BEST INTEREST HEARING NOTICE WITHOUT NOTIFYING APPELLANT OF THE HEARING."

FOURTH ASSIGNMENT OF ERROR:

"MISCELLANEOUS ISSUES WHICH CONTRIBUTED TO APPELLANT'S DIFFICULTIES IN THE HEARINGS BELOW WHICH, WHEN COMBINED WITH THE OTHER ASSIGNMENTS OF ERROR ARE SUFFICIENT TO JUSTIFY REVERSAL."

{¶ 3} Elizabeth L. Fisher, petitioner below and appellee herein, is the wife of Brandan A. Fisher, X.A.F.'s father and custodian. On December 8, 2016, appellee filed a petition to adopt her stepchild and alleged that the biological mother's (appellant's) consent is not required because, for a period of at least one year immediately preceding the filing of the adoption petition, she has failed, without justifiable cause, to: (1) have more than de minimis contact with the child and (2) provide for the child's maintenance and support as required by law or judicial decree.

{¶ 4} On February 9 and April 6, 2017, the Athens County Probate Court (trial court) held hearings on the issue of whether appellant's consent is necessary for the adoption to proceed. The court heard testimony from the biological parents, the petitioner, the maternal grandmother and the adoption assessor.

{¶ 5} At the hearing, the child's father testified that after X.A.F.'s October 24, 2012 birth, father, appellant and the child lived at father's parents' Meigs County home until April 2013, when appellant said that "she had to go get her life together." At that point, appellant moved to Kentucky and father had physical custody of the child. Father stated that, at first, appellant stayed in contact with him, but that May 2, 2013 is the last time father spoke with appellant when she signed a document that requested father have temporary custody of the child for six months. Father further testified that, after he hired an attorney to request full custody due to appellant's inappropriate child care and her drug addiction, the Meigs County Juvenile Court issued temporary orders that (1) designated father as the temporary residential parent and legal custodian, and (2) awarded appellant supervised visitation based upon the parties' agreement. Appellant subsequently filed a motion in the Juvenile Court to request visitation. Apparently, father appeared at the hearing, but appellant did not. Because appellant's whereabouts and activities were unknown, the juvenile court suspended appellant's previously ordered parenting time and awarded father full custody. At the adoption hearing, father also testified that appellee (Petitioner Elizabeth Fisher) began residing with him May 24, 2014, and the couple married October 22, 2016. Since he and appellee have been together, father explained that appellee has acted as a mother to the child and that he and appellee now have a child together. Father also stated that he understood that if the adoption is granted, appellee will have the same custody rights and obligations that he has.

{¶ 6} Father further testified that (1) from December 8, 2015 to December 8, 2016, appellant did not visit, call, write, send cards or gifts; (2) appellant last visited X.A.F. when he was approximately one year old; (3) although his phone number changed in April 2017, his parents

lived in the same location from 2015 to 2016 as when appellant and father resided there and that appellant had his parents' phone number; (4) his father worked at the same location for 30 years and appellant knew that location; and (5) the visitation entry stated that appellant should either contact the father or return to court "And she had all the rights to go back to court, and my address is in the court system, and if she wanted me to go back to court they will send me a court notice and we'll go back through there again."

{¶ 7} Appellant, who did not have counsel at the hearing, testified that when she attempted to contact father, "he had shut off all contact with me, uh, he had his family, uh, the godmother of my son, he uh, basically told her if she had any contact with me or let my son, let her see, you know, Brandan was letting her, you know, watch my son." Appellant also testified that once when she arrived late to a supervised visitation, father said "you're late and we're taking him to the zoo." After that, father's number and address changed and she could not locate him or her child. Appellant also claimed that she had records of attempted contact through Facebook and that she had gifts for her son at her mother's home.

{¶ 8} The evidence also reveals that on August 10, 2016, the Meigs County Juvenile Court ordered appellant to pay $168.95 per month for child support. However, father stated that, from December 8, 2015 to December 8, 2016, he received no support from appellant. Instead, he received a one-time $1,200 payment days before the February 9, 2017 consent hearing. Appellant also testified concerning the child support issue and stated that in August 2016 she had been ordered to pay child support, and "I explained to the judge I was pregnant at high-risk with twins, and they're in the NIC Unit right now, and uh, I have made a payment just recently. A current payment of $1200.00 and I am not behind on any child support right now. I did that because I

wasn't, you know, I was refused visitation for a year." It is, however, uncontroverted that appellant paid no support between December 2015 and December 2016.

{¶ 9} Appellant's mother, Cynthia Klein, testified that she had her son (appellant's brother) send a message to father's mother about going to a birthday party on October 23, 2015. She also stated that on December 22, 2015, they sent a message to father's mother and asked for the new number, but his mother said that she did not know where he lived. Klein also testified about appellant purchasing gifts during the previous year.

{¶ 10} On April 12, 2017, after considering all of the evidence adduced at the hearing, the trial court determined that appellant's consent to the adoption is not required. The court noted the undisputed evidence that appellant had no contact with her son since at least August 2014, well before the one year look-back period. As for the issue of justifiable cause for appellant's failure to have contact with her son, the court acknowledged that appellant suggested that she, her mother and her brother did make some "periodic efforts at contact," but those efforts failed either because of the father's physical move from Meigs County to Athens County or because the paternal grandmother did not foster contact. However, the court found, based upon the totality of the evidence, that because appellant had, at her disposal, the reasonable and customary means to establish contact with her son, her failure to have contact with her child is not justifiable and her consent to the adoption is not required.[2] This appeal followed.[3]

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[2] There appears to be differing views concerning the question of whether a party in an adoption proceeding must appeal a trial court's judgment within thirty days of the determination that no consent is required, or within thirty days of the ensuing best-interest determination. In *In re Greer*, 70 Ohio St.3d 293, 638 N.E.2d 999 (1994) the Ohio Supreme Court held that a determination that a parent's consent to adoption is not required constitutes a final appealable order. However, several Ohio appellate districts have determined that in an adoption proceeding a party may file an appeal after either the consent phase or after the best interest phase. See *In re A.L.*, 2d Dist Green No. 2007-CA0059, 2008-Ohio-13-02; *In re Eblin*, 126 Ohio App.3d 774, 711 N.E.2d 319 (3d Dist 1998); *In re S.L.N.*,

I.

{¶ 11} In general, the written consent of a minor child's natural parent is required prior to an adoption. However, R.C. 3107.07 provides exceptions to this requirement:

{¶ 12} Consent to adoption is not required of any of the following:

> (A) 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 * * * the filing of the adoption petition * * *.

{¶ 13} In the case sub judice, appellee's petition for adoption alleged that appellant's consent is not required because, for a period of at least one year immediately preceding the petition's filing, appellant failed, without justifiable cause, to (1) provide more than de minimis contact with the child and (2) to provide maintenance and support for the child. It is also very important to understand that R.C. 3107.07(A) is written in the disjunctive. Consequently, a failure without justifiable cause to provide *either* more than de minimis contact *or* maintenance and support for a one-year time period is sufficient to obviate the need for a parent's consent. *See In re Adoption of A.H.*, 9th Dist. Lorain No. 12CA010312, 2013-Ohio-1600, ¶ 9, citing *In re*

4th Dist. Scioto No. 07CA3189, 2008-Ohio-2996.

[3]Appellee did not file an appellate brief. When an appellee fails to file an appellate brief, App.R. 18(C) authorizes the appellate court to accept an appellant's statement of facts and issues as correct, and reverse a trial court's judgment if the appellant's brief "reasonably appears to sustain such action." In other words, an appellate court may reverse a judgment based solely on consideration of an appellant's brief. *See Harper v. Neal*, 4th Dist. Hocking No. 15CA25, 2016-Ohio-7179, ¶ 14, *Fed. Ins. Co. v. Fredericks*, 2nd Dist. Montgomery No. 26230, 2015—Ohio—694, ¶ 79; *Sites v. Sites*, 4th Dist. Lawrence No. 09CA19, 2010—Ohio—2748, ¶ 13; *Sprouse v. Miller*, 4th Dist. Lawrence No. 06CA37, 2007—Ohio—4397, at fn. 1. In the case sub judice, however, we conclude that appellant's brief does not support a reversal of the trial court's judgment.

Adoption of McDermitt, 63 Ohio St.2d 301, 304, 408 N.E.2d 680 (1980).

{¶ 14} The Supreme Court of Ohio has set forth a two-step analysis for probate courts to employ when applying R.C. 3107.07(A). *In re Adoption of M.B.*, 131 Ohio St.3d 186, 2012-Ohio-236, 963 N.E.2d 142, ¶ 23. The first step involves deciding a factual question---whether the parent willfully had failed to provide more than de minimis contact with the minor child. *Id.* at ¶ 21. "A trial court has discretion to make these determinations, and in connection with the first step of the analysis, an appellate court applies an abuse-of-discretion standard when reviewing a probate court decision * * *." *Id.* at ¶ 25. In the second step, if a probate court finds a failure to provide more than de minimis contact, the court then determines whether justifiable cause exists for the failure. *Id.* at ¶ 23. A probate court's decision on whether justifiable cause exists will not be disturbed on appeal unless the determination is against the manifest weight of the evidence. *Id.* at ¶ 24, citing *In re Adoption of Masa*, 23 Ohio St.3d 163, 492 N.E.2d 140, paragraph two of the syllabus, (1986).

{¶ 15} Because the relationship between a parent and child is a constitutionally protected liberty interest, *In re Adoption of Zschach*, 75 Ohio St.3d 648, 665 N.E.2d 1070 (1996), the termination of a parent's rights is the family law equivalent of the death penalty. Thus, 3107.07(A) must be construed strictly in favor of the non-consenting parent. *In re Hayes*, 79 Ohio St.3d 46, 679 N.E.2d 680 (1997). Moreover, "[b]ecause cases such as these may involve the termination of fundamental parental rights, the party petitioning for adoption has the burden of proving, by clear and convincing evidence, that the parent failed to [have more than de minimis contact] with the child during the requisite one-year period and that there was no justifiable cause for the failure of [contact]." *In re Adoption of Holcomb*, 18 Ohio St.3d 361, 368, 481 N.E.2d 613

(1985). Clear and convincing evidence "is that measure or degree of proof which is more than a mere 'preponderance of the evidence,' but not to the extent of such certainty as is required 'beyond a reasonable doubt' in criminal cases, and which will produce in the mind of the trier of facts a firm belief or conviction as to the facts sought to be established." *Cross v. Ledford*, 161 Ohio St. 469, 120 N.E.2d 118, paragraph three of the syllabus (1954).

II.

{¶ 16} In her first assignment of error, appellant asserts that the trial court erred by finding no justifiable cause for appellant's lack of contact with the child during the one year look-back period. The court held that "[i]t is undisputed that mother has not had contact with her son since at least August of 2014, well before the one year 'look back' from the petitioner's filing date." Because appellant does not challenge the de minimis finding, the sole issue is whether justifiable cause exists for appellant's failure to have contact with the child.

{¶ 17} Appellant argues that the evidence in this case supports the view that justifiable cause exists to excuse her lack of contact with X.A.F. Appellant points to several reasons, including: (1) father and appellee had moved, (2) father interfered with attempts to contact, and (3) her high-risk pregnancy made contact too difficult. Appellant points to *In re D.N.O.*, 5th Dist. Stark No. 2012-CA-00239, 2013-Ohio-601, in which the Fifth District affirmed the trial court's ruling that the biological father's consent to adoption was necessary. In that case, the father testified that after his release from prison, he attempted to contact the mother in order to see the child, but the telephone numbers had changed and mother did not respond to his letters or to two Facebook messages. The Fifth District concluded that the father's failure to communicate was justified and resulted from the mother's significant interference and discouragement.

{¶ 18} We, however, believe that *D.N.O.* is distinguishable from the case at bar. Although it appears that here the appellant's family may have made two attempts to contact father's relatives through Facebook, the trial court points out that no record exists of letters, cards, or other types of attempted contact. Moreover, appellant had the father's parents' address, as well as the ability to contact the father through the court. Appellant also points to her Meigs County visitation action, but the evidence actually reveals that appellant failed to appear in court to pursue her request for court ordered visitation. Moreover, it is undisputed that the September 2016 support order provided appellant with the address for father and X.A.F.

{¶ 19} Appellant also cites *In re J.P.E.*, 11th Dist. Trumbull Nos. 2016-T-0113, 2016-T-0114, 2017-Ohio-1108, in which the Eleventh District agreed with the trial court's finding that the natural parent's consent to the adoption was necessary. In *J.P.E.*, the court found that the mother's de minimis contact and lack of support were justifiable due to "significant interference." The *J.P.E.* evidence revealed that the mother had no contact information for her children, and that when she did find them, she attempted "several contacts through Facebook and other means." The court pointed out that mother continued to make alternative efforts to contact her children after the thwarted Facebook attempts, and "those efforts were met with significant interference and discouragement." The court concluded that the trial court's determination that mother's failure to have more than de minimis contact with her children was justified because (1) she did not know her children's location for most of the year, (2) the petitioner significantly interfered with, or discouraged, her attempts to make contact, and (3) the petitioner blocked the mother and her family's attempts to contact the children through their church and through Facebook.

{¶ 20} We, however, also believe that *J.P.E.* is distinguishable from the case sub judice.

Here, while appellant twice asked her brother to contact father's mother through Facebook, the appellant's attempted contact with her child does not exhibit close to the same degree, level or amount of effort as the parent exhibited in *J.P.E.* In addition, in the case at bar the record does not reveal any significant interference that prevented appellant's contact with her child. Although appellant testified that father moved and changed his phone number, the evidence reveals that appellant knew the location of father's parents and that they lived in the same residence since the child's birth.

{¶ 21} Recently, this court decided another case that involved the parental consent to adoption issue. See *In re B.B.S.*, 4th Dist. Washington No. 15CA35, 2016-Ohio-3519. In B.B.S., the mother made a very lengthy telephone call in addition to numerous text messages that demonstrated her desire to have contact with her child. However, that contact was not permitted to occur. In reversing the trial court's judgment, we determined that the significant discouragement of communication provided sufficient justification for the mother's failure to communicate with her child.

{¶ 22} We also believe that *B.B.S.* is distinguishable from the instant case. Once again, the effort exhibited in *B.B.S.* far exceeded the effort put forth in this case and see no significant discouragement of communication that prevented appellant from communicating with her child.

{¶ 23} We also highlight a relevant portion of the trial court's findings: "Of particular significance in reaching this decision is the fact that there have been frequent and ongoing proceedings in the Meigs County Juvenile Court involving this child, and the parental rights and responsibilities of these parents. Exhibits 'B,''C,' 'D,' and 'E' explain much of the proceedings of particular note are exhibits 'D' and 'E,' with the first journalizing mother's failure to appear and

advance her own motion for visitation, and the second ordering mother to pay support, and providing her with father's Athens County address."[4] The court also pointed out that Exhibit E, the child support order, provided appellant with father's Athens County address.

{¶ 24} Therefore, after our review of the evidence adduced at the hearing, we conclude that ample competent, credible evidence supports the trial court's determination that appellee proved, by clear and convincing evidence, that appellant failed, without justifiable cause, to have more than de minimis contact with X.A.F. for at least one year immediately preceding the filing of the adoption petition.

{¶ 25} Accordingly, based upon the foregoing reasons, we overrule appellant's first assignment of error.

III.

{¶ 26} In her second assignment of error, appellant asserts that the trial court erred by finding that no justifiable cause exists for her failure to pay support during the look-back period.

{¶ 27} Both Ohio common law and statutory law mandate that a parent provide sufficient support for his or her child. *Haskins v. Bronzetti,* 64 Ohio St.3d 202, 204-205, 594 N.E.2d 582 (1992). "Ohio has long recognized that a biological parent's duty to support his or her child is a 'principle of natural law' that is 'fundamental in our society.'" *In re Adoption of K.L.M.*, 10th Dist. No. 15AP-118, 2015-Ohio-3154, ¶ 10, citing *In re Adoption of B.M.S.*, 10th Dist. No. 07AP-236, 2007-Ohio-5966. Moreover, "[t]he biological or adoptive parent of a minor child must

[4] Exhibit A is the Agreement to Grant Temporary Custody. Exhibit B contains the Temporary Orders from Meigs County. Exhibit C is the 2013 paternity finding. Exhibit D is an entry stating that the matter came before the court for a final hearing on July 7, 2014 upon a motion for visitation filed by appellant. The entry indicated that Brandan appeared, but appellant did not. Exhibit E is the child support order.

support the parent's minor child out of the parent's property or by the parent's labor," R.C. 3101.03(A), and such duty is not dependent upon the presence or absence of court orders for support. *B.M.S.* at ¶ 23; *Nokes v. Nokes*, 47 Ohio St.2d 1, 351 N.E.2d 174 (1976).

{¶ 28} In the case sub judice, our review of the evidence reveals that during the December 2015 to December 2016 look back period, appellant provided no maintenance and support for X.A.F. Appellant, however, did make one support payment days before the consent hearing. Although appellant argues that she made a support payment prior to the probate court hearing, this payment occurred after the expiration of the one year look-back period. A late payment should not defeat the operation of the statute because a parent could always wait to pay support until after the filing of the petition in an effort to defeat the operation of the statute. The statutory language is clear and does not allow a parent to make payments beyond the one year period.

{¶ 29} The question appellant raises in her assignment of error is whether the trial court properly determined, by clear and convincing evidence, that appellant failed without justifiable cause to provide maintenance and support for her child. However, after our review of the trial court's judgment, it appears that the trial court did not explicitly address whether appellant's failure to pay support lacked any justifiable cause. Nevertheless, because R.C. 3107.07 is written in the disjunctive, a court need only find one of the two R.C. 3107.07 factors to conclude that a parent's consent to an adoption is unnecessary. Here, the court expressly determined that appellee failed without justification to have contact with the child during the look-back period. Thus, the issue of appellant's support for the child is not actually at issue in this case and has no bearing on the propriety of the trial court's judgment.

{¶ 30} Accordingly, based upon the foregoing reasons we overrule appellant's assignment

of error.

IV.

{¶ 31} In her third assignment of error, appellant asserts that the trial court erred by failing to issue a best interest hearing notice to appellant.

{¶ 32} Our review of the record reveals that after the trial court found that appellant's consent to the adoption is not required, the court then provided notice of the scheduled best interest hearing to Attorney Bunce (appellee's and father's attorney) and to the appellee, but not to appellant. However, when appellant filed her notice of appeal, the trial court continued the hearing until after the conclusion of appellant's appeal. Thus, it appears that appellant did not receive notice of the upcoming, but now continued, best interest hearing.

{¶ 33} We agree with appellant that the trial court should have provided appellant with notice of the best interest hearing. See *In re Walters*, 112 Ohio St.3d 315, 2007-Ohio-7. Although we understand that a court may reasonably believe that a parent who need not give consent for an adoption need not be provided notice of the best interest phase of the proceeding, it is conceivable that a parent may nevertheless possess pertinent and relevant information that pertains to the best interest issue. Nevertheless, we again point out that in the case sub judice the hearing has not yet been held and, thus, any arguable error constitutes harmless error that did not prejudice appellant. *See* Civ.R. 61 (a court "must disregard any error or defect in the proceeding" that does not affect a party's substantial rights); *Niskanen v. Giant Eagle, Inc.*, 122 Ohio St.3d 486, 2009-Ohio-3626, 912 N.E.2d 595, ¶ 26 quoting *Smith v. Flesher*, 12 Ohio St.2d 107, 110, 233 N.E.2d 137 (1967) ("'in order to secure a reversal of a judgment,'" a party "'must not only show some error but must also show that error was prejudicial to him'"); *Theobald v. Univ. of*

Cincinnati, 160 Ohio App.3d 342, 2005-Ohio-1510, 827 N.E.2d 365, ¶ 17 ("When avoidance of the error would not have changed the outcome of the proceedings, then the error neither materially prejudices the complaining party nor affects a substantial right of the complaining party.").

{¶ 34} Consequently, we believe that any arguable error that relates to the notice issue constitutes harmless error. After the conclusion of this appeal, the trial court will have the opportunity to provide notice of the best interest hearing to all interested parties, including appellant.

{¶ 35} Accordingly, based upon the foregoing reasons, we overrule appellant's third assignment of error.

V.

{¶ 36} In her fourth assignment of error, appellant asserts that various miscellaneous issues have contributed to appellant's difficulties and, when combined with the other assignments of error, justify the judgment's reversal. In particular, appellant argues that "because of the financial issues she testified to having prior to and during the look back period, she was unable to afford to retain counsel - and, indeed, even unable to afford to pay a filing fee for another visitation action." Appellant indicates that she is now in a better financial position and can employ counsel for this appeal and future litigation.[5]

{¶ 37} Finally, appellant states that the probate court file does not contain a copy of a Uniform Child Custody and Jurisdiction Enforcement Act (UCCJEA) affidavit, which, she asserts,

[5] Although appellant does not claim that she is entitled to court appointed counsel, we point out that this case is a probate court adoption petition, not a juvenile court termination of parental rights. As the law now stands, adoption proceedings in probate court, courts are not required to appoint counsel for indigent parties. *See*, *M.C.* at ¶ 2, *In re Adoption of J.L.M.*, 5th Dist. Muskingum No. CT2016-0030, 2017-Ohio-61, ¶¶ 12-13, *In re Adoption of Drake*, 12th Dist. Clermont No. CA2002-08-067, 2003-Ohio-510, ¶ 11.

is a jurisdictional requirement in custody cases. However, R.C. 3127.02 provides: "Sections 3127.01 to 3127.53 of the Revised Code [the UCCJEA] do not govern adoption proceedings or proceedings pertaining to the authorization of emergency medical care for a child."

{¶ 38} Thus, based upon the foregoing reasons, we overrule appellant's fourth assignment of error and affirm the judgment of the Athens County Common Pleas Court, Probate Division.

JUDGMENT AFFIRMED.

JUDGMENT ENTRY

It is ordered that the judgment be affirmed and that appellee recover of appellant 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 Athens County Common Pleas Court, Probate Division, to carry these judgments into execution.

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

Hoover, P.J. & McFarland, J. : Concur in Judgment & Opinion

For the Court

BY:_____

Peter B. Abele, 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.