

[Cite as *In re Adoption of T.R.S.*, 2014-Ohio-3808.]

STATE OF OHIO, BELMONT COUNTY

IN THE COURT OF APPEALS

SEVENTH DISTRICT

IN THE MATTER OF
THE ADOPTION OF:

T.R.S.

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CASE NO. 13 BE 43

OPINION

CHARACTER OF PROCEEDINGS:

Civil Appeal from the Court of Common
Pleas, Probate Division, of Belmont
County, Ohio
Case No. 13 AD 14

JUDGMENT:

Affirmed in part.
Vacated in part and Remanded.

APPEARANCES:

For Appellant Kyle Corbett:

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For Appellee Justin Swegard:

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JUDGES:

Hon. Cheryl L. Waite
Hon. Joseph J. Vukovich
Hon. Mary DeGenaro

Dated: August 28, 2014

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WAITE, J.

{¶1} Appellant Kyle Corbett appeals the judgment of the Belmont County Court of Common Pleas, Probate Division, granting the petition of adoption of T.R.S. filed by Appellee Justin Swegard. Appellant is the natural father of the child, and Appellee is the stepfather. The trial court held that Appellant's consent was not required for the adoption because he failed to maintain more than *de minimus* contact with the child or provide maintenance and support for the child. The trial court then granted the adoption petition. On appeal, Appellant argues that the evidence did not support the conclusion that he failed to maintain more than *de minimus* contact. Appellant is mistaken. Not only does the record support the conclusion that Appellant did not maintain more than *de minimus* contact, Appellant cannot succeed in this appeal because he did not challenge the trial court's conclusion that he also failed to provide maintenance and support for the child. Failure to provide maintenance and support provides an alternative basis under R.C. 3107.07(A) to affirm the trial court's determination that Appellant's consent was not required. Therefore, any error the court might have made regarding *de minimus* contact would not amount to reversible error. Appellant also argues that the court should have held a hearing to determine the best interests of the child before granting the adoption petition. Appellee concedes that Appellant is correct as to this issue. Although we affirm the court's decision that Appellant's consent was not required, this case is remanded to the trial court to determine the best interests of the child.

Case Background

{¶12} The child, T.R.S., was born on July 7, 2008. The biological mother is Megan Swegard and Appellant Kyle Corbett is the biological father. The two were not married when T.R.S. was born, but they did enter into a shared parenting agreement regarding the child that was approved by the Belmont County Court of Common Pleas, Juvenile Division. Megan later filed a motion to terminate shared parenting and reallocate parental rights after allegations were raised that Appellant had molested a handicapped child. The court granted the motion, after a hearing, on October 26, 2012. Appellant was represented by counsel at that hearing, but did not personally appear. Megan became the custodial and residential parent. Appellant was not granted visitation based on a finding that substantial harm could result to the child. (10/26/12 J.E.)

{¶13} Appellee Justin Swegard is married to the child's biological mother, Megan Swegard, and is the child's stepfather. On October 2, 2013, Appellee filed a petition for adoption in the Belmont County Court of Common Pleas, Probate Division. The adoption petition alleged that Appellant had failed to provide more than *de minimus* contact, maintenance, and support for the minor child for a period of at least one year immediately preceding the filing of the adoption petition.

{¶14} The court held a hearing on the petition on November 8, 2013. At the outset of the hearing, the court ordered that only the issue of whether the natural father's consent was required for the adoption would be considered at the hearing, and any further issues would be considered at a later date. With that understanding, four witnesses testified at the hearing: Megan Swegard, Appellee Justin Swegard,

Appellant Kyle Corbett, and Appellant's grandmother, Darlene Burch. Evidence was presented that Appellant had no contact with the child since July of 2011. (Tr., pp. 52, 70.) He had no personal contact, made no phone calls, and sent no cards, emails, or other messages. Appellant stated that in July 2013 he had filed a motion with the juvenile division of the court to regain some type of visitation, but the motion was not resolved prior to Appellee filing his adoption petition in October of that year. The trial court did consider the impact of the prior juvenile court order denying Appellant visitation time, and found that the order did not prevent Appellant from having other types of contact outside of visitation.

{¶15} Evidence was also presented that Appellant was gainfully employed in the year prior to the filing of the adoption petition, but that he had not provided any type of financial support for the child. Appellant alleged that he had purchased some gifts and necessities for the child but they were never delivered. Appellant admitted multiple times that he had not actually provided any maintenance or support. (Tr., pp. 52-53, 70.) The court concluded that there was no justification for the lack of financial or other support.

{¶16} The court issued its judgment on November 20, 2013. The court found that Appellant had failed to provide contact, maintenance and support for the child in the 12 months prior to the filing of the adoption petition. The court found that Appellant's consent for the adoption was not required. The court then granted the adoption petition but also scheduled another hearing. This timely appeal followed.

{¶7} The court's judgment is a final appealable order both because it determined that Appellant's consent was not required, which is in itself a final appealable order, and because the petition for adoption was actually granted. *In re Adoption of Greer*, 70 Ohio St.3d 293, 638 N.E.2d 999 (1994), paragraph one of the syllabus; *In re R.M.*, 7th Dist. No. 07 MA 232, 2009-Ohio-3252, ¶65.

ASSIGNMENT OF ERROR NO. 1

The trial court abused its discretion when it granted the petition for adoption of the minor child without first holding a hearing to determine the best interest of the minor child and without first determining that the adoption is in the best interest of the minor child after consideration of the factors enumerated in R.C. § 3107.161.

{¶8} Appellant argues that the trial court should not have granted the adoption petition without first holding a hearing and making a determination as to the best interests of the child. Appellant is correct that an adoption petition entails two rulings by the court: determination of whether written consent of the parents is required and has been obtained; and determination that the adoption is in the best interests of the child. R.C. 3107.06-084, 3107.11, 3107.14, 3107.161. In this case, the court did not make a best interests finding and failed to conduct a hearing on this matter. The record clearly reflects that the only issue at the November 8, 2013, hearing was parental consent to adoption, and the court set another hearing for December 20, 2013, presumably to determine the best interests of the child. (11/8/13 Tr., p. 3.) Appellant contends that the court erred by granting the adoption

without conducting the hearing on the best interests of the child and without making the required finding. Appellee agrees with this argument and concedes that the case should be remanded so that a second hearing can take place on the best interests of the child.

{¶9} In an adoption case where a natural parent of a minor child refuses to consent to the adoption of that child, a court should conduct a bifurcated procedure. *In re Adoption of Jorgensen*, 33 Ohio App.3d 207, 515 N.E.2d 622 (3d Dist.1986). First, the court determines the issue of necessity of consent. R.C. 3107.07(A). *Id.* at 208. A judgment on the issue of consent is filed, and if the finding is that consent is not required, a second hearing is held on the best interests of the child. See R.C. 3107.12; 3107.14. We have previously held that “the probate court must conduct another evidentiary hearing and give 20 days notice of the hearing to decide the best interests of the child after it decides that a parent's consent is not necessary for the adoption to take place.” *In re R.M.*, *supra*, at ¶62.

{¶10} Although a court is permitted to issue an interlocutory order of adoption after a final adoption hearing, the court must still make a best interests determination in an interlocutory order after it finds that parental consent has been obtained or is not required. R.C. 3107.14(C). Because the court ordered another hearing after it issued its decision on the consent to adoption, it is possible that the court intended only to issue an interlocutory order of adoption in this case. The fact remains that the hearing on the best interests of the child should actually have been held and a finding made before issuing either an interlocutory or final adoption decree. The parties can

agree to waive the bifurcation requirements and allow all issues to be heard at a single hearing, but there is no indication that occurred here. *In re: the Adoption of Jessica K.*, 12th Dist. No. CA92-07-013, 1993 WL 77195 (Mar. 22, 1993).

{¶11} The parties are correct that the adoption petition should not have been granted without a second hearing and a finding regarding the best interests of the child. Therefore, that part of the trial court's judgment granting the adoption is vacated and the case will be remanded to the trial court for further proceedings.

ASSIGNMENT OF ERROR NO. 2

The trial court abused its discretion by finding that Appellant's consent was not required because he did not provide more than *de minimis* contact with the child when Appellant had filed a Petition for Visitation with the Belmont County Juvenile Court on July 10, 2013, which is within one year immediately preceding the filing of the adoption petition on October 2, 2013.

{¶12} Appellant argues that the court should not have found that he failed to provide more than *de minimus* contact with T.R.S. because he was trying to reestablish contact by filing a petition for visitation in the juvenile division of the court a few months prior to Appellee filing his adoption petition. Appellant argues that the record shows he was demonstrating initiative in trying to regain judicially approved visitation with T.R.S. Appellant cites no cases that equate filing a petition for visitation with providing actual contact. Appellant merely cites to the general principle that “[a]ny exception to the requirement of parental consent must be strictly construed

so as to protect the right of natural parents to raise and nurture their children.” *In re Adoption of Schoeppner*, 46 Ohio St.2d 21, 24, 345 N.E.2d 608 (1976).

{¶13} Appellee argues that Appellant cannot establish reversible error in this appeal because the trial court made a second alternative finding that Appellant failed to provide maintenance and support for the child, and this alternative finding was sufficient for the court to hold that Appellant's consent was not required. Appellee contends that R.C. 3107.07(A) mandates that the natural parent provide both elements, *i.e.*, contact as well as maintenance and support, in order to avoid a finding that parental consent is not required. Appellee is correct. “According to the statute, either a lack of contact or a lack of support can relieve the petitioner from having to obtain the parent's consent.” *In re J.D.T.*, 7th Dist. No. 11 HA 10, 2012-Ohio-4537, ¶10. Since Appellant does not challenge the court's finding that he failed to provide maintenance and support and the record supports the court's finding, Appellant cannot prevail on appeal. Appellant clearly stated at the hearing that he provided no maintenance or support for the child. (Tr., p. 52.)

{¶14} Appellee also argues that the prior order denying visitation should not be used as an excuse by Appellant for failure to have any other contact with the child because the order did not prevent Appellant from engaging in many (or any) other forms of contact with T.R.S., including phone calls, emails, letters, cards, or internet social media. Appellee contends that a court order denying visitation is not justifiable cause for not providing other forms of contact unless the order actually states that there is to be no contact at all, citing *In the Matter of the Adoption of M.S.*, 7th Dist.

Nos. 11 BE 14, 11 BE 15, 2011-Ohio-6403, ¶17. Again, Appellee is correct in his assertion.

{¶15} Under R.C. 3107.07(A), in order to overcome the parental consent requirement, the petitioner must prove that the natural parent failed to provide more than *de minimus* contact or maintenance and support:

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 either the filing of the adoption petition or the placement of the minor in the home of the petitioner.

{¶16} An adoption case involves the termination of fundamental parental rights. *In re Adoption of Holcomb*, 18 Ohio St.3d 361, 368, 481 N.E.2d 613 (1985), *overruled on other grounds by statute*. *Holcolmb* sets forth the burden of proof regarding the question of parental consent to adoption: “the party petitioning for adoption has the burden of proving, *by clear and convincing evidence*, that the parent failed to communicate with the child during the requisite one-year period and that there was no justifiable cause for the failure of communication.” (Emphasis sic.) *Id.* at 368. Clear and convincing evidence is that proof which establishes in the minds of

the trier of fact a firm conviction as to the allegations sought to be proved. *Cross v. Ledford*, 161 Ohio St. 469, 477, 120 N.E.2d 118 (1954). Justifiable cause is a factual question. *Holcomb* at paragraph three of the syllabus. The reviewing court must examine the record and determine if the trier of fact had sufficient evidence before it to satisfy this burden of proof, and should not reverse the probate court's decision unless it is not supported by clear and convincing evidence. *Id.* at 368. In other words, the probate court's determination will not be disturbed unless it is against the manifest weight of the evidence. *In re Adoption of Bovett*, 33 Ohio St.3d 102, 515 N.E.2d 919 (1987), paragraph four of the syllabus.

{¶17} At the time *Holcomb* was issued, the statute allowed even *de minimus* contact and support to preserve a parent's right to consent to an adoption. R.C. 3107.07 was amended in 2009, and now the parental consent requirement can be preserved only if the parent has provided more than *de minimus* contact and support.

{¶18} The record indicates without any doubt that Appellant failed to have any contact with T.R.S. within one year of the adoption petition being filed, and Appellant does not deny this. Appellant admitted at the hearing that he made no attempt to contact T.R.S. after July of 2011:

Q: Did you make attempts to have contact after that hearing and after that entry went on?

A: No, sir.

(11/8/13 Tr., p. 53.)

{¶19} Appellant contends, though, that the prior juvenile court order denying him visitation, and his attempt at reestablishing visitation, should constitute justifiable cause for failing to have any form of contact with the child. Appellant also contends that Megan refused his requests for parenting time, but this was apparently in August of 2013, after the court had already denied Appellant any visitation rights. (Tr., pp. 17-18.) Appellant was apparently asking Megan to disobey the court order and allow him visitation time. Megan was unwilling to violate the no-visitation order, but there is no evidence that Megan denied Appellant any of his legal rights regarding all other forms of contact.

{¶20} As we held in *Adoption of M.S.*, the mere existence of a no-visitation order is not justifiable cause for failing to use other types of communication to stay in contact with the child. In *Adoption of M.S.*, the no-visitation order was not permanent and was subject to modification, similar to the order in the instant appeal. *Id.* at ¶17. It was also clear in *Adoption of M.S.*, just as in this case, that the order did not prohibit all contact, but only denied direct face-to-face visitation. If other avenues of communication are left open and the parent fails to use them, the no-visitation order cannot be used to establish justifiable cause for the absolute failure to communicate with the child. *Id.* at ¶18. Other courts have agreed that a no-visitation order does not constitute justification for failing to communicate with a child under R.C. 3107.07(A). *In re Adoption of Mineer*, 4th Dist. No. 03CA768, 2004-Ohio-656, ¶18-21; *In re K.K.*, 9th Dist. Nos. 05CA008849, 05CA008850, 2006-Ohio-1488, ¶11.

{¶21} The only other evidence relied on by Appellant is the motion he filed attempting to reestablish visitation. While this is certainly evidence that he was attempting to reestablish personal visitation, Appellant still has no explanation why he failed to use all the other means available to him to communicate with T.R.S other than visitation. Appellant has cited no precedent that would prevent a probate court from finding that parental consent is not required for an adoption simply because the parent files a motion to restore visitation, especially when that parent has acknowledged that he made no attempt at all to communicate with the child through any available channels. If the no-visitiation order had been a no-contact order, the result in this case may well be different, but the caselaw is clear that a no-visitiation order, by itself, is no justification for a parent failing to use other means to communicate with the child. A tardy filing of a motion for visitation is irrelevant in light of a parent's total failure to communicate.

Conclusion

{¶22} The court's decision that Appellant's consent was not required for adoption is affirmed. The court determined that Appellant had failed to communicate with the child and failed to provide maintenance and support. Appellant claims he could not communicate with the child due to a no-visitiation order from the juvenile court. Appellant failed to challenge both aspects of the trial court's judgment regarding parental consent, and for that reason alone, cannot prevail on appeal. Consent is not required if the court finds that the parent failed to communicate with the child or failed to provide maintenance and support, and the court found that

Appellant provided neither. Appellant only argues that the court erred with respect to the finding that he failed to communicate with the child. Since failure to provide maintenance and support provides a separate basis for upholding the trial court's judgment, we overrule Appellant's assignment of error. Further, the record shows that Appellant completely failed to communicate with the child and was not barred by the no-visitation order from other forms of communication. The late filing of a motion for visitation does not provide justification for complete failure of communication. Appellant is correct, though, that the trial court should not have granted the adoption petition without first holding a best interests hearing, as Appellee concedes. That portion of the trial court's judgment entry granting the adoption is vacated and the case is remanded for further proceedings to determine the best interests of the child. The trial court's decision that Appellant's consent was not required is affirmed.

Vukovich, J., concurs.

DeGenaro, P.J., concurs.